

No. 16091✓

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United States  
Court of Appeals  
for the Ninth Circuit

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CHARLES W. GRIMM, Appellant,

VS.

CALIFORNIA SPRAY-CHEMICAL CORPORA-  
TION, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
Northern Division

FILED

OCT 23 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Fresno, California,

For Appellee.





In the United States District Court, Southern Dis-  
trict of California, Northern Division

No. 1798—N.D.

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPOR-  
ATION, a corporation, Defendant.

PETITION FOR REMOVAL OF ACTION ON  
GROUND OF DIVERSITY OF CITIZEN-  
SHIP

To the United States District Court, Southern District of California, Northern Division:

The petition of California Spray-Chemical Corporation, a corporation, respectfully shows:

I.

That on the 24th day of July, 1957, an action was commenced in the Superior Court of the State of California, in and for the County of Kern, by the filing of a complaint therein entitled Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, a corporation, defendant, being No. 70422 in the files of said Court.

## II.

That Charles W. Grimm is the only plaintiff in said action and that at the time of the commencement of said action and ever since the said Charles

W. Grimm has been and now is a resident and citizen of the State of California.

### III.

That the only defendant named in said action is California Spray-Chemical Corporation, a corporation, and at the time of the commencement of said action the said California Spray-Chemical Corporation was and at all times thereafter has been and now is a corporation organized under and existing by virtue of the laws of the State of Delaware, and that said corporation is, therefore, a resident and a citizen of the State of Delaware.

### IV.

That in said action plaintiff seeks to recover a judgment from petitioner, the defendant therein, in the sum of \$63,764.00. Said action is a civil action wherein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is between citizens of different states.

### V.

That summons was served upon petitioner, together with a copy of said complaint, in the County of Contra Costa, State of California, on the 9th day of August, 1957, and this was the date of the first receipt by the petitioner of a copy of said complaint. Attached hereto are copies of the complaint and summons marked Exhibit "A", being all the pleadings, process and orders served on petitioner in said action to the day of the filing of this petition.

VI.

Petitioner presents herewith and files a bond with good and sufficient surety as required by the statutes in such cases, conditioned that it will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VII.

Petitioner desires to remove said action to this Court as permitted by law.

Wherefore, petitioner files this petition for the removal of said action from the Superior Court of the State of California, in and for the County of Kern, to the United States District Court for the Southern District of California, Northern Division, and prays that said action stand so removed.

WILD, CHRISTENSEN, BARNARD  
& WILD,

/s/ By ROBERT M. BARNARD,  
Attorneys for Petitioner

Duly Verified.

## EXHIBIT "A"

In the Superior Court of the State of California  
in and for the County of Kern

No. 70422—Charles W. Grimm, Plaintiff, vs. California Spray-Chemical Corporation, a corporation, Defendant.

## COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

## I.

That at all times herein mentioned plaintiff was the owner of a twenty (20) acre peach orchard located upon that parcel of real property situate and being in the County of Kern, State of California, and more particularly described as the South Half of the Southwest Quarter of the Southwest Quarter of Section 32, Township 12 South, Range 19 West. S.B.B. & M.

## II.

That on or about January 1, 1957 plaintiff solicited the services of defendant for the purpose of preparing and supplying plaintiff with an insecticide to be used in said peach orchard for the purpose of controlling certain insects known as olive scale, San Jose scale, mites and peach tree twig bore.

## III.

That defendant caused an examination of said orchard to be made and became familiar with the conditions there prevailing and for such conditions

## Exhibit "A"—(Continued)

prescribed and sold to plaintiff an insecticide presumed to contain medium oil, Mytox and lead arsenic in proportions sufficiently strong to control said bugs and insects but not sufficiently strong to damage or harm the crop of peaches then growing on the trees or the trees in said orchard and defendant did orally warrant and represent that the chemicals and chemical compounds would be fit and proper for such purpose and uses and did orally warrant and represent that the application thereof would not be harmful to or adversely affect said crop.

## IV.

That plaintiff did apply the spray to the orchard upon the representations of defendant and in reliance upon defendant's superior knowledge of the quality and quantity of said chemical and chemical compounds and their effectiveness in doing the job for which they were purchased, and upon defendant's superior knowledge of the manner and method of application and the quantities necessary to be used for such purpose, to wit: the destruction, prevention and control of Olive Scale, San Jose Scale, mites and peach twig bore, and of other bugs and insects which might affect and infest said crop and trees.

## V.

That but for said representations and warranties made by defendant as aforesaid plaintiff would not have purchased said insecticide or applied said insecticide to said orchard.

## Exhibit "A"—(Continued)

## VI.

That said representations and warranties were, and each of them was, false; that relying upon said representations and warranties, plaintiff caused said insecticide to be applied to said orchard in the manner and in the proportions prescribed by defendant.

## VII.

That as a direct and proximate result of the application of said insecticides 582 out of 1090 trees in said orchard planted to peaches known as "Merrill Jem" variety, and the crop growing thereon, were destroyed, as a result of which plaintiff has suffered damages as follows: \$14,400.00, being the reasonable value of the crop then growing, and a like amount for the next ensuing years which will be required to plant new trees and bring them to bearing, to plaintiff's further damage in the sum of \$43,200.00; \$1,164.00 to remove the damaged tree stumps; and \$5,000.00 to replant said trees and bring them to harvest, all to plaintiff's damage in the total sum of \$63,764.00.

As and for a Second and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

## I.

Realleges Paragraphs I, II, III, IV, V, and VII of the First Cause of Action by reference.

## II.

That defendant was negligent in and about the



## Exhibit "A"—(Continued)

selection of the formula used in the preparation of said materials and in the manner in which the materials were mixed and prepared and in the manner in which plaintiff was instructed to use said materials, and as a direct and proximate result of such negligence plaintiff suffered the damages referred to herein.

As and for a Third and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

## I.

Realleges Paragraphs I, II, IV and VII of the First Cause of Action by reference, and incorporates the same in this Third Cause of Action as though set forth herein in full.

## II.

That at plaintiff's request defendant caused an examination of said orchard to be made by its agents and employees and became familiar with the condition of the fruit and trees growing therein, and became familiar with and knew the purpose for which plaintiff intended to use the said chemicals and insecticides so furnished by defendant to plaintiff.

## III.

That defendant did then and there by implication warrant that said chemicals and insecticides were in all respects fit and proper for the purpose for which defendant knew plaintiff intended to use them and in reliance on defendant's said warranty

## Exhibit "A"—(Continued)

and superior skill, experience and knowledge plaintiff did purchase and use the same.

## IV.

That said chemicals and insecticides were in fact unfit and unsuited for the purpose for which plaintiff intended to use the same and did damage plaintiff's fruit and trees as hereinabove alleged; and that within a reasonable time after said damage became apparent and said unfitness was ascertained plaintiff did notify defendant thereof.

Wherefore, plaintiff prays judgment against the defendant for the sum of Sixty Three Thousand Seven Hundred Sixty Four Dollars (\$63,764.00); for costs of suit; and for such other and further relief as to the Court may seem meet and proper in the premises.

CONRON, HEARD & JAMES,  
By WAYNE M. HAMILTON,  
Attorneys for Plaintiff

State of California,  
County of Kern—ss.

Charles W. Grimm, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters



Exhibit "A"—(Continued)

therein stated on his information or belief, and as to such matters he believes it to be true.

Charles W. Grimm

Subscribed and sworn to before me this 15th day of July, 1957.

Wayne M. Hamilton,

Notary Public in and for said County and State.

[Title of Superior Court and Cause No. 70422.]

ORIGINAL SUMMONS

Action brought in the Superior Court of the State of California, in and for the County of Kern, and . . . . Complaint filed in the office of the Clerk of the said Superior Court in and for said County. Conron, Heard & James, Suite 7, Habermfelde Bldg. Arcade, Attorneys for Plaintiff.

The People of the State of California send Greetings to California Spray-Chemical Corporation, a corporation, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Kern, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Kern, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the Plaintiff will take

## Exhibit "A"—(Continued)

judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the State of California, in and for the County of Kern, July 24, 1957.

[Seal]

VERA K. GIBSON,

County Clerk and ex Officio

Clerk of Superior Court

/s/ By H. M. FARNSWORTH,

Deputy

[Endorsed]: Filed August 27, 1957.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT, CALIFORNIA  
SPRAY-CHEMICAL CORPORATION

Comes now the defendant, California Spray-Chemical Corporation, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

In answer to the allegations in paragraph 1 of the first cause of action, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in said paragraph and placing its denial upon this ground, denies generally and specifically all of the allegations of paragraph 1 of the first cause of action.

## II.

In answer to the allegations of paragraph 2, 3, and 4 of the first cause of action of plaintiff's complaint, this answering defendant alleges that it did sell to plaintiff an insecticide containing medium oil, mytox and lead arsenic and that said insecticide was sprayed upon certain peach trees by plaintiff on March 5, 1957. Except as so admitted, defendant denies all of the allegations of paragraph 2, 3, and 4 of the first cause of action of plaintiff's complaint.

## III.

Defendant denies the allegations of paragraph 5 and 6 of the first cause of action of plaintiff's complaint except that defendant does admit that plaintiff caused said insecticide to be applied to said peach orchard as hereinabove admitted.

## IV.

Defendant denies generally and specifically each and every allegation of paragraph 7 of the first cause of action.

## V.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff.

Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand Seven Hundred and Sixty Four Dollars (\$63,-764.00) or any other sum or at all.

In Answer to the Second Cause of Action Defendant Admits, Denies and Alleges:

### I.

In answer to the allegations of paragraph 1, 2, 3, 4, 5 and 7 of the first cause of action as realleged in paragraph 1 of the second cause of action, this defendant admits and denies said allegations in the same manner and in the same extent that said allegations are admitted or denied in its answer to the first cause of action.

### II.

Defendant denies generally and specifically all of the allegations of paragraph 2 of the second cause of action.

### III.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff. Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand

Seven Hundred Sixty Four Dollars (\$63,764.00)  
or any other sum or at all.

Answer to the Third Cause of Action

In answer to the allegations of paragraphs 1, 2, 4, and 7 of the first cause of action incorporated by reference in paragraph one of the third cause of action, this answering defendant admits and denies the allegations of said paragraph to the same extent and in the same manner that said allegations are admitted and denied in the answer of this defendant to the first cause of action. In answer to paragraph 4 of the third cause of action, this defendant denies, generally and specifically each and every allegation thereof.

II.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff. Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand Seven Hundred Sixty Four Dollars (\$63,764.00) or any other sum or at all.

Wherefore, defendant prays that plaintiff take

nothing by reason of his complaint and that this defendant have his costs of suit incurred herein.

WILD, CHRISTENSEN, BARNARD  
& WILD,

/s/ By ROBERT M. BARNARD,  
Attorneys for Defendant, California Spray-Chemical Corporation, a corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 11, 1957.

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In the United States District Court, Southern District of California, Northern Division

No. 1798—ND Civil

CHARLES W. GRIMM,                      Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,              Defendant.

JUDGMENT  
(On Jury Verdict)

The above entitled cause came on regularly for trial on April 8, 1958, before the Court and a Jury, the Honorable, Gilbert H. Jertberg, presiding, with plaintiff being then and there represented by Wayne M. Hamilton of Conron, Heard & James, Lawyers, his attorneys of record herein, and with defendant being then and there represented by Robert M. Barnard of Wild, Christensen, Barnard & Wild,



attorneys, its attorneys of record herein; and evidence both oral and documentary having been heard, read and considered, and the Court and Jury having heard the arguments of counsel for both parties, and the Jury having been duly instructed; and after due deliberation having on April 16, 1958, rendered and returned to the Court its verdict for the plaintiff and against the defendant, assessing and awarding plaintiff damages in the sum of Four Thousand Seven Hundred and Fifty Dollars (\$4,750.00);

Now, Therefore, It Is Ordered and Adjudged that plaintiff Charles W. Grimm, have and recover from defendant, California Spray-Chemical Corporation, a corporation, whose principal place of business in the State of California is located at Lucas and Ortho Way, Richmond, California, the sum of \$4,750.00 with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid together with his costs of action incurred herein taxed in the sum of——Dollars.

Dated at Fresno, California, this 23rd day of April, 1958.

/s/ GILBERT H. JERTBERG,  
United States District Judge

Approved as to Form April 22, 1958.

WILD, CHRISTENSEN, BARNARD  
& WILD,

/s/ By ROBERT M. BARNARD,  
Attorneys for Defendant

[Endorsed]: Filed April 23, 1958. Entered April 25, 1958.

[Title of District Court and Cause.]

### NOTICE OF ENTRY OF JUDGMENT

To: Conron, Heard & James, Suite 7, Habersfelde Bldg. Arcade, Bakersfield, California; Wild, Christensen, Barnard & Wild, Eighth Floor-Helm Bldg., Fresno, California.

You are hereby notified that Judgment in the above-entitled case has been entered this day in the docket.

Dated: April 25, 1958, Los Angeles, California.

Clerk, U. S. District Court  
By C. A. SIMMONS,  
Deputy Clerk

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[Title of District Court and Cause.]

### NOTICE OF INTENTION TO MOVE FOR NEW TRIAL ON ISSUE OF DAMAGES

(Rule 59 of F.R.C.P. and Rule 15 of Rules of U. S.  
District Court, Southern District of California)

To the Honorable Gilbert H. Jertberg, Judge of the  
above entitled United States District Court,  
and to Defendant above named, and to Wild,  
Christensen, Barnard & Wild, its attorneys:

You and Each of You Will Please Take Notice  
that, Charles W. Grimm, plaintiff above named, in-  
tends to and will, on Monday, May 12, 1958, at the  
court rooms of said Court in the Federal Building



at Fresno, California, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, move said Court for its order vacating and setting aside that portion of the verdict of the jury, heretofore entered herein, and that portion of the judgment, heretofore entered herein, according to said verdict, wherein and whereby said jury fixed and assessed plaintiff's damages in the sum of \$4,750.00, and for said Court's further order granting plaintiff a new trial on the sole and exclusive issue of the extent and nature of plaintiff's damages. Said motion will be made upon the following grounds:

1. Inadequate damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages. (Particulars wherein evidence is claimed to be insufficient are specified in attached Points and Authorities in Part II, under the heading "Amount of Damages Fixed by the Jury Are Inadequate".)

Said motion will be based upon all of the pleadings and documents on file herein, and the minutes of the Court, including, but not limited to, the Clerk's minutes, notes and memoranda made at the time of trial hereof, and kept by the Court, the reporter's record of evidence heard and received, and upon the Points and Authorities attached hereto.

Dated this 1st day of May, 1958.

CONRON, HEARD & JAMES,  
/s/ By WAYNE M. HAMILTON,  
Attorneys for Plaintiff

Points and Authorities in Support of Motion for a New Trial Limited to the Issue of Damages and Specification of the Particulars Wherein the Evidence Is Deemed Not Sufficient to Support Verdict of the Jury Fixing Damages.

Authorities and argument will be set forth herein on the following points listed in order of presentation:

I. The Court is authorized to grant a new trial on limited issues.

II. The amount of damages fixed by the jury are inadequate and are not supported by the evidence.

III. If the damages fixed in the verdict are less than the undisputed amount proved, or are such as to indicate a reckless disregard for the evidence, or are such as to shock the conscience of the Court, a new trial on the issue of damages should be granted.

IV. A new trial limited to the issue of damages should be granted, where the sum awarded is grossly inadequate, where that issue is distinct and separable from other issues, and where there is no close inter-relationship between the evidence concerning the cause of the injury, and the extent and nature of the injury.

V. If an injustice has been done, it is the duty of the Court to exercise its discretionary powers to correct that injustice.

VI. Conclusion.

I.

The Court is Authorized to Grant a New Trial on Limited Issues.

Rule 59 of the Federal Rules of Civil Procedure, in so far as it is material here, reads as follows:

(a) "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States \* \* \*"

Rule 17 of the Rules adopted by the United States District Court of the Southern District of California appears to have been an effort to make more specific the general language of the above mentioned Rule 59, concerning the grounds on which a new trial may be granted. It reads in part as follows:

"(a) The general language of Rule 59 of the F.R.C.P. includes \* \* \* the following grounds:

"(5) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

"(6) Insufficiency of the evidence to justify the verdict or other decision."

A new trial may be granted to a party on all or part of the issues where there has been a trial by jury. *Martin vs. Payton*, (D.C. Ky. 1957) 20 F.R.D. 200.

Argument: Rule 59 (a) of the Federal Rules of Civil Procedure, Rule 17 of the Local Federal District Court Rules, and the case cited above, which is one of many that could be cited on this point, leave no doubts that, given a proper case, and the proper circumstances, the Court has the power and jurisdiction to grant to either party, on motion made, a partial new trial limited to specific issues.

## II.

The Amount of Damages Fixed by the Jury Are Inadequate and not Supported by the Evidence.

Plaintiff's evidence on the extent and nature of his damages was as follows:

Loss in fair market value—\$5,740.00.

Only two witnesses testified on this issue. John Kovacevich stated that in his opinion Grimm's orchard was worth \$2,200.00 per acre prior to the damage and worth \$1,500.00 after the damage. The difference is \$700.00 per acre.

Charles Grimm testified that in his opinion the orchard was worth \$2,250.00 per acre before the injury and \$1,550.00 after the injury. Again the difference is \$700.00 per acre.

Grimm testified, and this was the only evidence in the record on this issue, that the orchard covered 8.2 acres of land.  $8.2 \times \$700.00$  equals \$5,740.00.

Expense of repairing damage—\$1,089.50.

Mr. Grimm was the only person who testified on this issue. In brief, his testimony was as follows:

The unbalanced trees would have to be propped up, and he would need 360 props at 50c each, or a total cost of \$180.00.

The cost of installing and removing props for the estimated 3 years such work would be necessary would be \$200.00. He admits this is simply his best estimate.

The trees would have to be whitewashed for two years to prevent sunburn. He had whitewashed the trees the first time in March of 1958 at a cost of \$90.00. The total cost would be \$180.00.

He would have to pull new limbs into vacant areas by rope ties, or push new limbs into vacant areas by bracing across from old limbs, in order to reshape the damaged trees for shade and balance. This was done at the time the orchard was pruned in late November 1957. Mr. Grimm estimated the cost of this work to have been \$270.00.

It cost Mr. Grimm \$484.50 to cut away, haul, stack and burn the dead limbs. But this included the cost of a power saw purchased for this job at a cost of \$225.00. The cost of this work, less the price of the saw, which he still has, would be \$259.50.

Loss of production in 1957—\$8,398.00.

Grimm had 726 trees in their 5th leaf.

Glenn Moody testified that Merrill Gem peaches in healthy condition should produce 5 to 6 lugs per tree.

Grant Merrill testified that such trees should produce 4 to 8 lugs per tree.

Mr. Grimm testified that he did harvest 1756 lugs

of peaches from his Merrill Gem trees and did sell them for a net of \$3.23 per lug, after his picking, packing and container expense was subtracted from the F.O.B. price.

The average production of the Grimm orchard, based on Moody's evidence, should have been 5.5 lugs per tree, based on Merrill's evidence, it should have been 6 lugs per tree, and based on both Moody's and Merrill's, 5.75 lugs per tree.

If production should have been 5.5 lugs per tree:

726 trees at 5.5 lugs equals 3993 lugs.

3993 lugs less 1756 harvested equals 2237 lugs lost.

2237 lugs lost at \$3.23 per lug equals \$7,225.51.

If production should have been 5.75 lugs per tree:

726 trees at 5.75 lugs equals 4174 lugs.

4174 lugs less 1756 harvested equals 2418 lugs lost.

2418 lugs lost at \$3.23 per lug equals \$7,810.14.

If production should have been 6 lugs per tree:

726 trees at 6 lugs per tree equals 4356 lugs.

4356 lugs less 1756 harvested equals 2600 lugs lost.

2600 lugs lost at \$3.23 per lug equals \$8,398.00.

The defendant argued for a different method of accounting for Grimm's loss of production in 1957. Defendant's contentions, if memory serves me correctly, were as follows:

There were 726 trees in Grimm's orchard.

This is a total of 3630 limbs, at five limbs per tree.



The maximum possible production would have been 8 lugs per tree or 1.6 lugs per limb.

Grimm lost 22 trees entirely; 58 trees had 3 major limbs cut off; 93 trees had 2 primary limbs cut off; and 128 trees had one primary limb cut off. This is a total of 598 limbs lost.

598 limbs should have produced 956.8 lugs, which, at \$3.23 per lug, would have returned him \$3,090.46.

On this method of accounting, Mr. Grimm's damage through loss of production in 1957 was \$3,090.46.

Loss of production during period of regrowth—\$7,330.36.

In 1958 Mr. Grimm's Merrill Gem orchard would have been in its 6th leaf. Both Moody and Merrill testified that the Merrill Gem peach reaches maximum production at the 6th or 7th leaf.

#### Historic Price Evidence:

Grant Merrill 1957 Net per lug \$2.58.

Glenn Moody 1957 Net per lug \$3.68.

Charles Grimm 1957 Net per lug \$3.23.

Average of all three per lug \$3.16.

The Moody and Grimm harvest dates are 3 to 5 days earlier than Merrill's. Average of Moody and Grimm prices is \$3.45.

#### Historic Production Evidence:

Grant Merrill 1951 lugs per tree 4.6.

Grant Merrill 1954 lugs per tree 8.4.

Grant Merrill 1957 lugs per tree 7.4.

Glenn Moody 1957 lugs per tree 5.87.

Average production in lugs per tree—6.32.

Using the average net price (after harvest costs have been deleted) of Merrill, Moody and Grimm, and their average production in lugs per tree ( $6.32 \times \$3.16$ ) each tree should return Grimm \$19.97 and each primary limb should return (\$19.97 divided by 5) should return Grimm \$3.99.

Using the average net price of only Grimm and Moody, based on a better price because of an earlier harvest, and the average in lugs per tree ( $6.32 \times \$3.45$ ) each tree should return \$21.80 and each primary limb (\$21.80 divided by 5) \$4.36.

Grant Merrill testified that, in his opinion, the new wood that would have to be regrown to replace the limbs cut out of the Grimm orchard because of the injury to the trees would produce no fruit in 1957 and 1958. In 1959 this new growth would produce 20% of the peaches that the dead limb would have produced, if it had remained on the tree in a normal, healthy condition. In 1960 the new growth would produce 40% of a normal crop; in 1961—60% of a normal crop; and in 1962 the new growth would attain maximum production, or about 80% of a normal crop.

Mr. Grimm testified, and the chart of his orchard (P's Exh. 1) showed that 22 trees were killed or cut back to the stump; on 58 trees 3 primary limbs were destroyed, on 93 trees 2 primary limbs were destroyed, and on 128 trees 1 major limb was destroyed.

Using the Moody-Grimm net price average, the Moody-Merrill production average, and the Merrill schedule of production from the new growth,



Grimm's 1958, 1959, 1960 and 1961 losses are as follows:

1958

22 stumps at \$21.80 each.....	\$ 479.60
488 limbs lost at \$4.36 each.....	2127.68

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Total loss in 1958.....\$2607.28

1959

Grimm's loss will be 80% of 1958 or.....\$2085.82

1960

Grimm's loss will be 60% of 1958 or.....\$1564.35

1961

Grimm's loss will be 40% of 1958 or.....\$1042.91

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Total Temporary Loss in Production.....\$7300.36

If the Merrill-Moody-Grimm price average is substituted for the Moody-Grimm price average, in the above calculations, the loss is reduced by \$618.27 to \$6,682.09.

The defendant produced no evidence on historic prices and production and no evidence on how soon or in what amounts the new growth would produce peaches. However, it should be noted that, through the witness Frank Hornkohl, the defendant did produce some evidence concerning the number of trees on which all growth above the stump had been destroyed and the number of scaffold or primary or major limbs that had been killed. As compared with Mr. Grimm's count, Mr. Hornkohl found a greater number of trees killed back to the stump, but a lesser number of primary limbs destroyed. In argu-

ment, counsel for the defendant stated that the variance between the Hornkohl and Grimm evidence on the amount of destruction was so minor that the jury could ignore Mr. Hornkohl's testimony.

Argument:

The items of damage as calculated by the method used by the plaintiff are as follows:

(1) Loss in Fair Market Value .....	\$ 5,740.00
(2) Expense of Repairing Damage .....	1,098.50
(3) Loss of Production in 1957.....	8,398.00
(4) Loss of Production During Period of Regrowth .....	7,300.36
<hr/>	
Total Damage.....	\$22,527.86

Defendant argued for a different method of calculating item (3). Its calculations result in a loss of production in 1957 of a value of \$3,090.46. If this sum is substituted in the damage account for plaintiff's item (3) the total damage is \$17,220.32.

All of the items of damage as listed in plaintiff's account, including both nature and amount, except item 3, are wholly undisputed either in the evidence or in defendant's argument. Item 3 is wholly undisputed at the sum of \$3,090.46. It follows that plaintiff showed undisputed damages of at least \$17,220.32. In the face of such evidence, and in spite of the absence of dispute, the jury assessed the plaintiff's damages at \$4,750.00. Such sum is grossly inadequate and is not supported by the evidence.

Item (1) is based exclusively on expert testimony.

The remaining items are mixtures of fact and expert opinion. Item (2) is based solely on Mr. Grimm's testimony. The cost of props is factual. The number of props necessary and the cost of putting them out and taking them in is an estimate. The cost of whitewashing the trees is based on fact inasmuch as he has already performed one whitewashing job. The cost of reshaping his trees, which was done at pruning time, is an opinion. A portion of the pruning costs was allotted to the work of tying and bracing. The cost of cutting away, removing and disposing of the dead material is based on fact.

Item (3) is based on the fact that the Merrill Gem peaches that Mr. Grimm did harvest brought a net return of \$3.23 per lug and the expert testimony as to the number of lugs of peaches a Merrill Gem tree in its 5th leaf should produce.

Item (4) in so far as it is based on historic price and production is factual. The schedule of production from new growth is of course expert testimony.

It is familiar law that the jury is not bound by the opinions of experts. It is also familiar law that the power of the jury to ignore either expert testimony or factual testimony is not to be exercised arbitrarily, but must be exercised with sincere judgment, mature discretion, and must be based on sound ground. The amount of the verdict is left to the sound discretion of the jury, but must be just, reasonable and based on the evidence introduced.

The Court will note that in so far as the extent

and nature of the damages to the Grimm orchard are concerned, neither the factual evidence nor the expert opinion evidence was disputed. There was no conflicting expert testimony. Therefore, it is within the shelter of the rule (California Jury Instructions, Civil, B.A.J.I. No. 33-B.) that the jury is not permitted to arbitrarily reject such evidence, unless the same is unreliable or unworthy of belief. *Obold vs. Obold*, (C.A.D.C. 1947) 163 Fed. 2d 23, 33; *United States vs. 76,800 Acres of Land, etc.* (D.C.Ga. 1942) 42 Fed. Supp. 102 (cited and quoted below).

### III.

If the Damages Fixed in the Verdict Are Less Than the Undisputed Amount Proved, or Are Such as to Indicate a Reckless Disregard for the Evidence, or Are Such as to Shock the Conscience of the Court, a New Trial on the Issue of Damages Should be Granted.

Where the verdict for the plaintiff was less than the amount of loss shown and not disputed, a motion for a new trial on the issue of damages should have been granted. *Devine vs. Patteson*, (C.A. Ten. 1957) 242 Fed. 2d 828.

A Federal District Court will not invade the jury's determination of the facts, unless their determination was such as to shock the Court's conscience and indicate that there was a gross error or a reckless disregard of the evidence on the part of the jury in fixing the amount. *Tomaine vs. Pennsylvania Railroad Co.*, (D.C. Pa. 1956) 144 Fed. Supp. 445.

Rule 59 of the Federal Rules of Civil Procedure does not authorize the Court to substitute its determination on questions of fact for that of the jury, but does authorize a redetermination of issues for reasons, which in the interests of justice, are compelling. *Benjamin vs. Lehigh Valley R. Co.* (D.C. N.Y. 1950) 10 F.R.D. 154.

The awarding of damages in a grossly inadequate amount is a ground for a new trial. *Spero-Nelson vs. Brown*, (C.A. Ohio 1949) 175 Red. 2d 86.

Where the undisputed evidence showed the plaintiff was entitled to a much greater sum than that to which he was awarded, the trial Court has the duty to set aside the verdict and grant a new trial on plaintiff's motion. *Mahon vs. Bennett*, (D.C. Mo. 1948) 75 Fed. Supp. 666.

The jury may not arbitrarily disregard the testimony of unimpeached witnesses, so far as they testify as to facts, and a wilful disregard of such testimony is ground for a new trial. *U. S. vs. 76,800 Acres of Land, etc.*, (D.C. Ga. 1942) 42 Fed. Supp. 102.

The Judge of a Federal District Court has the power and duty to set aside a verdict against the overwhelming weight of the evidence and to grant a new trial in a proper case. *Magee vs. General Motors Corp.*, (C.A. Pa. 1954) 213 Fed. 2d 899.

### Argument.

The point is perhaps being unduly belabored. However, the writer feels that it merits repeating. The plaintiff's evidence, both factual and opinion,



on his damages stands in the record wholly uncontradicted and without conflict. The loss in fair market value is undisputed at \$5,740.00. The cost of repairing the damage is undisputed at \$1,089.00. Assuming that the jury selected the lowest possible production from Merrill Gem peach trees in their 5th leaf and calculated the 1957 loss on the basis argued for by the defendant. (The \$3,090.00 sum is based on an 8 lug production. Merrill testified production should be from 4 to 8 lugs per tree.) and further assuming that the jury might have selected 4 lugs per tree as being the more reasonable. The 1957 loss at absolute minimum would be \$1,545.00. Even the most arbitrary could not conclude that the new growth would produce peaches in 1958. Therefore, the 1958 loss, again at an absolute minimum would be \$1,545.00. Further assuming that it might be concluded that all further losses are remote and speculative, we have an undisputed, conclusively proved loss totaling \$9,919.00.

To award Mr. Grimm only \$4,750.00 for his damages under such circumstances cannot but shock the conscience of persons generally. It indicates an arbitrary and reckless disregard for the evidence.

#### IV.

A New Trial Limited to the Issue of Damages Should Be Granted, Where the Sum Awarded Is Grossly Inadequate, and There Is No Close Relationship Between Evidence Concerning the Cause of the Injury to the Orchard and Evidence Concerning the Extent of the Injury.

Where damages assessed by the verdict of the jury were grossly inadequate, and there was no need for another trial, on other issues raised, a new trial would be granted as to damages only. *Chesevksi vs. Strawbridge & Clothier*, (D.C.N.J. 1938) 25 Fed. Supp. 325.

A Federal Court has the power to set aside a jury verdict in part and limit the new trial to the issue of damages, if that issue is so separable and distinct from that of proximate cause, that the single issue can be tried without prejudice or injustice. *Bass vs. Dehner*, (D.C. N.M. 1938) 21 Fed. Supp. 567.

Under Rule 59 the Federal District Court has jurisdiction to grant a new trial for inadequacy of damages awarded and should do so when the verdict is so inadequate as to shock the conscience of the Court, awards only nominal damages or is less than the amount of loss, which the defendant did not dispute. *Springer vs. J. J. Newberry Co.* (D.C. Pa. 1951) 94 Fed. Supp. 905; Affirmed 191 Fed. 2d 915.

The practice of permitting a partial new trial may be resorted to only when it clearly appears that the issue to be retried is distinct and separable, and a trial on that issue alone may be had without injustice. *Martin vs. Payton*, (D.C. Ky. 1957) 20 F.R.D. 200; See also *Yates vs. Dann*, (D.C. Del. 1951) 11 F.R.D. 386.

#### Argument.

Nine witnesses, Hench, Wilson, Hesse, Harper, Weigle, Brown, Thompson, Howard and Sessions,

testified on the issue of proximate cause. Except for Ashley Browne's statement to the effect that, it did not become objectively evident that the orchard was showing some recovery until late August or September, none of these witnesses gave any evidence whatsoever on the extent of the damage to the orchard or the extent of Grimm's losses.

Six witnesses, Kovacevich, Merrill, Moody, Hanna, Hornkohl and Grimm testified on the issue of the extent of the damage to the orchard and the amount of Grimm's losses. If the writer's memory is correct, except for the statement by Merrill and by Hornkohl, that the Merrill Gem peach was more susceptible to oil damage than some other varieties, these witnesses gave no testimony whatsoever on the question of liability or proximate cause.

With the exception of Kovacevich, who was put on out of order, as a matter of courtesy and convenience to him, the order of submission of evidence during the trial demonstrates conclusively that the issues of causation and damage are distinct and separable.

## V.

If An Injustice Has Been Done, It Is the Duty of the Court to Exercise Its Discretionary Powers to Correct That Injustice.

In *Southern Pacific Co. vs. Guthrie*, (C.C.A. 9th 1951) 186 Fed. 2d 926, Justice Pope, citing among other cases *Montgomery Ward & Co. vs. Duncan*, 311 U. S. 243, 251, states:

"On such a motion (motion for a new trial) it is



the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence \* \* \* or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

On appeal from an order granting a motion for a new trial, Justice Griffin of the 4th District Court of Appeal, with Justice Barnard and Mussell concurring, stated in *Tice vs. Kaiser Co.*, 102 Cal. App. 2d 44, 46 (1951) as follows:

"It is not only the right, but the duty of the trial judge to grant a new trial when in his opinion he believes the weight of the evidence to be contrary to the findings of the jury. Trial judges have been commended, rather than condemned, for their actions in granting new trials under these circumstances."

#### Argument.

To send Charles W. Grimm from this Court with the token judgment of \$4,750.00, when the undisputed and conclusively proved minimum loss is \$9,919.00, when a reasonable judgment would be somewhere between \$17,220.00 and \$22,527.00, and the evidence if maximized would support a judgment at a much higher figure, constitutes a miscarriage of justice. Such results, if left to stand, undermines the jury system.

## VI.

## Conclusion.

In the opinion of the writer this cause was tried by defendant solely on the issue of proximate cause. The extent of the damages suffered by the plaintiff were wholly ignored in the presentation of the defendant's case. The jury's verdict on liability could have gone either way, and it would have been supported by substantial and credible evidence. The witnesses, Hench, Wilson, Hesse, Harper, Weigle and Browne, all testified that the injury to the Grimm orchard was caused by the spray mixture, by an outside source, or by the oil in the spray. The witnesses, Thompson, Howard and Sessions, testified that the spray materials or the oil in the amounts used could not have caused this damage.

On the only contested issue fully and completely tried, the jury brought in a verdict against the defendant. Both the plaintiff's and defendant's order of presentation of evidence clearly demonstrates that the two issues, to wit, causation and extent of damages, are clearly distinct and separable. Each issue can be tried separately without prejudice or injustice to either party.

Inasmuch as the jury was advised by counsel for the defendant to ignore and disregard the testimony of the witness, Hornkohl, in so far as it concerned the extent of the injury to the Grimm orchard, it can be said that not one scintilla of evidence on the issue of the extent of damages and the amount of loss suffered by Grimm was produced by the de-

defendant. At an absolute and irreducible minimum the undisputed loss is more than \$9,000.00. An award of \$4,750.00 is grossly inadequate and is not supportable by the evidence.

The only area when an injustice has occurred is in the amount of damages fixed by the jury. The defendant will not be prejudiced or imposed upon by a new trial on this issue.

When it lies within the discretionary powers of the Court to correct an injustice, and there is sound and reasonable grounds for the exercise of that discretion, the interests of justice compel the exercise of it.

Respectfully submitted this 2nd day of May, 1958.

CONRON, HEARD & JAMES,  
/s/ By WAYNE M. HAMILTON,  
Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 3, 1958.

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[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL BY DEFENDANT

The defendant California Spray-Chemical Corporation, respectfully moves the court for a new trial of the above entitled action upon the following grounds: (1) That the court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and

Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant. (2) That the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the court, and (3) newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action. Said newly discovered evidence being described in the affidavit of Alwyn C. Sessions filed herewith.

Dated: May 5, 1958.

Respectfully submitted,

WILD, CHRISTENSEN, BARNARD  
& WILD,

/s/ By ROBERT M. BARNARD,  
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT OF ALWYN C. SESSIONS IN  
SUPPORT OF DEFENDANT'S MOTION  
FOR NEW TRIAL

State of California,  
County of Fresno—ss.

Alwyn C. Sessions, being first duly sworn, deposes and says:

That he is in charge of the Research Department of the Fresno District Office of California Spray-Chemical Corporation and is the same Alwyn C. Sessions who testified in the recent trial in the above entitled action. That since the conclusion of the trial in the above entitled action, he has made an investigation of a condition existing in peach and other stone fruit trees in the Wheeler Ridge and Arvin areas of Kern County, California. That the condition found by the affiant became noticeable in the spring of 1958 after the 1st of April, 1959, and that therefore the evidence of such condition was unavailable to defendant at the trial of this action and could not have been produced by any of the company's representatives at that time.

That affiant has found that a substantial number of peach and other stone fruit orchards in the said area are affected with a pathological condition apparently substantially the same as the condition of the plaintiff Charles Grimm orchard in the spring of 1957, although the orchards hereinafter referred to had not been sprayed with any material that could contribute to this condition. That affiant has not had an opportunity to make a thorough and complete analysis of the condition of each of the orchards hereinafter referred, but states that in his opinion the disease suffered by the said orchards appears to be the same condition as that suffered by the Grimm orchard in 1957.

The orchards to which affiant is herein referring are:

1. Charles Grimm—Substantially adjacent to the Merrill Gem orchard of Charles Grimm, which has been involved in the above entitled action, the said Charles Grimm has in 1958 planted an orchard of over 20 acres of peach trees which are at this time in their first leaf. Affiant is informed and therefore states that this orchard has not been sprayed with any spray whatsoever. During the last 10 days of April, 1958, at the time this orchard was examined by affiant, approximately one-third of the trees in this orchard were exhibiting signs of a condition which appeared to be identical with that suffered by the Merrill Gem orchard in 1957. Approximately one-fourth of said trees have died, or are dying. The cambium layer beneath the bark of the dead and dying branches and trunks exhibit a discoloration and carry the sour smell typical of the condition found in the Grimm orchard in question.

2. Don Barkley—The orchard of Don Barkley, located on Sunset Avenue west of Comanche, is an orchard of Sunrise Nectarines and Robin peaches. This orchard was sprayed in the completely dormant stage with materials known to be entirely harmless to stone fruits. During the last two weeks in April, 1958, the condition of this orchard was called to the affiant's attention, and it was found to have a condition similar to that of the Grimm orchard in 1957. Some of the trees have died, upon some of the trees one or more limbs have died or are dying and a discoloration of the cambium beneath the bark of the trunk and primary limbs is



evident as is the sour smell accompanying such affected orchards.

3. E. O. Mitchell—Comanche Road south of Sunset. This is an orchard of Santa Rosa Plums which was recently called to our attention and which during the spring of 1957 exhibited a condition similar to the Grimm orchard in the same year. The large dead limbs on these trees have not been removed and the pictures taken of this orchard show how severe the condition may become.

4. Giumarra Ranch 489 No. 6—This orchard is near Arvin, California, and is a Santa Rosa Plum orchard, which during the last two weeks of April, 1958, developed conditions which are similar in every respect to that on the Grimm orchard in 1957. This orchard has not been sprayed with any product whatsoever following dormancy. The condition of the trees in this orchard is typical in every respect to the trees in the Grimm orchard and a comparison of the photographs of the two, which are hereafter referred to, shows no substantial variations.

Another Giumarra Ranch orchard located on Wheeler Ridge Road north of Panama Road was also examined by affiant and appears to have suffered from a condition similar to the Grimm orchard. Some of the trees have died, but in general the destruction is not so uniformly distributed in this orchard as was noted in the case of the Grimm orchard.

Affiant states that the year 1958 has been a late

growing spring and for that reason the development of the trees and of these bacterial diseases in Kern and other counties of the valley has been approximately two to three weeks later than the development of the trees and diseases which occurred in the spring of 1957. For this reason most trees in the area were, on or about the 15th of April, 1958, in substantially the same condition of spring growth as were the trees in the month of March, 1957. For this reason, at the time of the trial of this action, to wit, on April 8 through 16, 1958, the condition of the orchards above described (with the exception of the Mitchell orchard) and of other orchards in Kern County had not yet become noticeable evident or serious since such condition is one which becomes apparent following the leafing out and spring growth of the trees.

Affiant further states that he has taken photographs of the orchards hereinabove referred to and that said photographs are available as evidence in a subsequent trial of this matter.

/s/ ALWYN C. SESSIONS

Subscribed and sworn to before me this 5th day of May, 1958.

[Seal] /s/ ROBERT M. BARNARD,  
Notary Public in and for said County and State

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1958.



[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL ON ISSUE OF DAMAGES ALONE

Defendant California Spray-Chemical Corporation hereby opposes the application of plaintiff for a new trial confined to the issue of damages. Said defendant would not oppose a new trial on all issues and in fact has simultaneously moved the court for an order granting a new trial as to all issues. Opposition to the plaintiff's request for a limited new trial is based upon the following:

That the trial court has the power to grant a new trial on part of the issues is beyond question, and in fact is specifically permitted by court rule, but such a limited new trial should not be granted where substantial justice requires that a new trial, if granted at all, should cover all of the issues. (Keough vs. Maulding, 52 CA 2d 17.)

In the instant case the jury had deliberated from approximately 3:00 o'clock p.m. on April 15, to approximately 3:30 p.m. on April 16 (excluding time for meals and sleep). At this time, four of the jurors announced that the jury was in a hopeless deadlock. Upon being sent back for additional deliberation the jury reached a verdict in approximately thirty minutes. The amount of that verdict, \$4,750.00, has been stated by plaintiff to be hopelessly inadequate. Defendant, of course, feels that

the amount of the verdict is actually more than the plaintiff is entitled to, but defendant does agree with the plaintiff that if the question of liability was to be eliminated, the damages sustained by plaintiff far exceed the sum awarded. Under the authorities, such a verdict is obviously a compromise verdict and it has been many times held that an order granting a new trial as to the question of damages along under such circumstances is an abuse of discretion and reversible error.

In the case of *Southern Railway Company vs. Madden*, 235 F.2d 198, the court stated in part:

“\* \* \* the verdict of \$5,000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered if the jury had found real liability on the part of the defendant. To allow such a verdict to stand as establishing liability while granting a new trial on the issue of damages alone is, in our opinion, not sustainable as a sound exercise of discretion.”

In an earlier appeal in the same case, the court had considered the question of a partial new trial more fully. Although such consideration on the earlier appeal was dicta, the remarks there made were adopted by the court in the second appeal. In the earlier appeal (224 F.2d 320) the court quoted with approval its decision in *Schuerholz vs. Roach*, 58 F.2d 32, as follows:

“It is inconceivable that any jury, having agreed upon the issue of liability, should have

reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court \* \* \* it is a sound judicial and not an arbitrary discretion which must be exercised. A failure in this regard *in subject to revision.*' " (Underlining, ours.)

One additional statement was made in the Schuerholz case which we should like to quote to the court:

"We are satisfied that in the pending case the

action of the District Court in granting a new trial generally was the only way in which justice could have been done. It is obvious, as the plaintiff contends and the District Judge held, that the sum of \$625 for the loss of an eye was grossly unjust and inadequate. It must have been so regarded by the very jurors who rendered the verdict, and it can give rise only to the inference that it did not represent a fair estimate of the plaintiff's loss, but merely a difference of opinion among the jurors as to the defendant's liability and a compromise of the controversy at the expense of both litigants. Such a finding ought not to stand. It ought to be set aside not only as to damages, but as to liability, for it speaks with no greater authority on the one subject than on the other." (Underlining ours.)

The cases in California are in entire agreement with the Federal cases just quoted. In his work on California Procedure, B. E. Witkin, in considering the problem on page 2088, stated:

"Verdicts are sometimes rendered in personal injury or death actions which, in view of the evidence of injuries, suffering, medical and other expenses, are clearly inadequate. Common experience suggests that these are the result of compromises, some jurors believing that the evidence fails to establish liability, but yielding to the extent of agreement on a small recovery. It would be unfair to the defendant to ignore this unmistakable evidence of

compromise and to accept the verdict for the plaintiff at face value as a determination of liability. Accordingly it is well settled that the error calls for a general new trial, and limited order is an abuse of discretion." (Underlining ours.)

The statement just quoted from Witkin on Procedure is in entire agreement with two recent California cases, the case of Leipert vs. Honold, 39 C. 2d 462 and Hamasaki vs. Flotho, 39 C. 2d 602.

The defendant, therefore respectfully submits that a new trial should be granted in this action for the reason that the verdict of the jury was obviously a compromise verdict and that therefore the issue of liability has not actually been determined. Defendant submits, however, that under the authorities cited above, and the many other authorities consistently taking the same position, the new trial should be on all issues.

Respectfully submitted,

WILD, CHRISTENSEN, BARNARD  
& WILD,

/s/ By ROBERT M. BARNARD,  
Attorneys for Defendant California  
Spray-Chemical Corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES S. PEDEN,  
JURY FOREMAN

State of California,  
County of Kings—ss.

James S. Peden being first duly sworn, deposes and says:

That he is over the age of 21 years, a citizen of the United States, resides at 1601 North Douty Street, Hanford, California, and was selected the foreman of the United States District Court Jury that heard the action entitled, "Charles W. Grimm versus California Spray Chemical Corporation," starting on April 8, 1958, and ending on April 16, 1958.

That at or about 11:00 o'clock a.m. on April 16, 1958, the twelve jurors reached a unanimous decision to the effect that the damage to the plaintiff's peach orchard was caused by the spray materials used, that is to say that the damage was chemical damage caused by the chemicals in the spray mixture. The jury was, at all times thereafter, unanimous to the effect that the defendant, California Spray-Chemical Corporation, was liable for the damage to Mr. Grimm's orchard.

All discussion after approximately 11:00 o'clock a.m. on April 16, 1958, concerned the amount of damages. The only issue on which the jury appeared to become hopelessly deadlocked was on the issue or question of the amount of loss Mr. Grimm had



suffered. The amount awarded by the jury was a compromise with at least ten members of the jury initially stating that Mr. Grimm was entitled to more than the amount awarded.

/s/ JAMES S. PEDEN,  
Affiant

Subscribed and sworn to before me this 16th day of May, 1958.

[Seal] /s/ F. D. BADASKE,  
Notary Public in and for said County and State.

Acknowledgment of Service attached.

[Endorsed]: Filed May 19, 1958.

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[Title of District Court and Cause.]

## AFFIDAVITS IN OPPOSITION TO AFFI- DAVIT OF ALWYN C. SESSIONS

Comes now Charles W. Grimm, plaintiff above named, and in opposition to defendant's motion for a new trial, and especially in opposition to the affidavit of Alwyn C. Sessions, purporting to set forth certain items of evidence, alleged to have been newly discovered, respectfully submits the following affidavits, attached hereto and submitted herewith:

Exhibit 1—Affidavit of W. W. Wright;

Exhibit 2—Affidavit of W. H. Hart;

Exhibit 3—Affidavit of Ray Mitchell;

Exhibit 4—Affidavit of Joe Giumarra with Exhibit A.

And plaintiff further submits, in opposition to defendant's motion for a new trial, the affidavit of James S. Peden, the foreman of the jury that heard the trial of the above entitled cause, which said affidavit is served and filed herewith.

Dated this 16th day of May, 1958.

CONRON, HEARD & JAMES,  
/s/ By WAYNE M. HAMILTON,  
Attorneys for Plaintiff

### EXHIBIT No. 1

### AFFIDAVIT OF W. W. WRIGHT

State of California,  
County of Kern—ss.

W. W. Wright, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States and is one of the co-owners of the Bi-Wright Nursery located at 805 34th Street, Bakersfield, California.

That in January of 1958, Charles W. Grimm did purchase from and through affiant approximately 400 small peach trees of the Springtime Variety. These trees were delivered to Mr. Grimm in February of 1958, and were set out in a five acre plot of ground on his ranch in the Wheeler Ridge area of Kern County, California.

That affiant has on several occasions since February of 1958 examined the above mentioned 5 acres of peach trees on the Grimm ranch and has



submitted samples of the wood, leaves and roots from the trees to others for examination and laboratory inspection. That at affiant's last examination of this lot of trees, some 250 appeared to be dead or dying.

That affiant obtained this lot of trees for Mr. Grimm through the Armstrong Nursery located at Ontario, California. That unknown to affiant at the time of delivery, this lot of Springtime trees were affected with a form of root rot commonly known as crown rot or wet feet, and technically known as phytophthora canker.

Crown rot is a common, well known disease, easily identified. It attacks trees planted in heavy type soils, lacking good drainage, to which excess water is applied, either by irrigation or by rain. These trees were either started or bedded in heavy soil and the excess rain experienced in the spring of 1958 caused this condition to develop before the trees were planted in the Grimm orchard.

Arrangements have been completed to replace all the Springtime peach trees lost by Charles W. Grimm in the spring of 1959.

/s/ W. W. WRIGHT,  
Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ WAYNE M. HAMILTON,

Notary Public in and for said County and State.

## EXHIBIT No. 2

## AFFIDAVIT OF W. H. HART

On Thursday morning, May 8, 1958, at the request of Kern County Agricultural Commissioner C. Seldon Morley, I inspected the young peach and nectarine orchard of Don Barkley, one-half mile west of Mitchell's Corner. Roots were examined from dead or dying trees and from trees which showed one or more dead branches.

Infection by root-knot nematodes, *Meloidogyne* sp., was found to be very severe on most of the trees examined. Root-knot nematode galls were very abundant and many roots were dead as a result of the infection.

The severity of infection, in my judgment, was sufficient to have severely injured these trees, and to have resulted in the poor growth and death of limbs or entire trees which was observed.

/s/ W. H. HART,

Associate Plant Pathologist (Nematology), Bureau  
of Plant Pathology, Department of Agriculture,  
State of California.

Subscribed and sworn to before me this 8th day  
of May, 1958.

[Seal] /s/ EDNA MURPHY,

Notary Public in and for the County of Kern, State  
of California.

EXHIBIT No. 3

AFFIDAVIT OF RAY MITCHELL

State of California,  
County of Kern—ss.

Ray Mitchell being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States and one of the Executors of the E. O. Mitchell Estate.

That affiant has read the affidavit of Alwyn C. Sessions, signed before Robert M. Barnard, a notary public, on May 5, 1958, and, from its heading, designed for use in an action filed in the United States District Court, Southern District of California, Northern Division, in an action entitled Charles W. Grimm, plaintiff, versus California Spray-Chemical Corporation, defendant.

That the Santa Rosa Plum orchard referred to in the Sessions affidavit on page 3, lines 3 through 8 is a part of the land farmed by the Estate of E. O. Mitchell and affiant, as a son of E. O. Mitchell, and one of the Executors of his estate, is familiar with that orchard.

That said Santa Rosa Plum orchard is 7½ acres in size. The trees are grafted onto almond root stock, the variety of which is unknown to affiant. It was first planted in 1924. The trees are thirty-four years old, and are at least ten years past their maximum productive life. The orchard is suffering from nothing more than old age and the lack of

expert care and attention, because of declining yields.

As soon as estate matters will permit, it is expected that these plum trees will be pulled out and field crops raised on the land or other tree fruits planted therein.

/s/ RAY MITCHELL,

Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ WAYNE M. HAMILTON,  
Notary Public in and for said County and State.

#### EXHIBIT No. 4

#### AFFIDAVIT OF JOE GIUMARRA

State of California,  
County of Kern—ss.

Joe Giumarra being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States, and President of the Giumarra Vineyards Corporation.

That the Santa Rosa Plum orchard located on the Giumarra Ranch 489, No. 6 near Arvin, California, referred to in the Alwyn C. Sessions affidavit on page 3, at lines 9 through 17 is in fact a Beauty Plum orchard.

That in March and April of 1958 affiant had this orchard examined by members of the staff of the Kern County Farm Advisor's Office and by members of the staff of the Department of Pomology

of the University of California at Davis, California, and has submitted samples of wood, leaves, roots and soil to said persons for laboratory analysis.

That the conditions in said orchard are caused by nothing more than an accumulation of Sodium Chloride or other soluble sodium salts in the soil in amounts more than Beauty Plum trees can tolerate.

The above fact is proved by reports of the laboratory analysis of soil samples taken and submitted for laboratory examination by Kenneth W. Hench of the Kern County Farm Advisor's Office and by the report of Al Rizzi an Extension Pomologist at the University of California at Davis, California, a copy of which is attached hereto.

/s/ JOE GIUMARRA,

Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ ROBERT MORSE MURRAY,  
Notary Public in and for said County and State.

Exhibit "A"

Date: May 1, 1958. To: Kenneth W. Hench. Signed  
A. D. Rizzi.

From: A. D. Rizzi, Extension Pomologist.

Enclosed please find the analysis report of the Beauty plum leaves which you submitted on April 14 from the Giumarra Brothers Orchard.

It is quite apparent that the sodium content is in

high excess of what fruit trees can tolerate. We usually find scorch occurring on the leaves at levels of .25 per cent of either sodium or chloride. Below this point sometimes leaf scorch is not in evidence but there may be adverse effects on the trees as far as vigor and ability to size fruit is concerned.

After you have taken the soil samples and the sodium content of the soil is determined it might be worthwhile trying to apply some corrective measures. However I suspect that the conditions that are present in this orchard are the same as we have observed in the past and in other orchards and that by the time the corrective measures will have a chance to show any benefit the grower will become discouraged and remove the trees and go back to row crops operations. However it would still be worth a trial to see what could be done to correct the problem, if it does not include too large a portion of the orchard.

Report of Analysis:

Sheet No. 1, County Kern. Submitted by 4/14/58.  
Date: Hench. Grower's name: Guimarra Bros. Variety and kind: Beauty Plum.

Results of Determinations: Field Sample % Dry Weight Basis: K 1.15; Ca 0.86; Mg. 0.21; Na 1.32; P 0.329; Cl 0.19. ppm Mn 75. Lab. No. X3202.

Remarks: Very high sodium. Chloride is high enough to be within critical range. K may be considered low but this is due to antagonism by sodium. ADR.

Acknowledgment of Service attached.

[Endorsed]: Filed May 19, 1958.



In the United States District Court, Southern District of California, Northern Division

No. 1798—ND

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation, Defendant.

MEMORANDUM AND ORDER ON MOTIONS  
FOR A NEW TRIAL AND ORDER FIXING  
DATE FOR RE-SETTING FOR TRIAL

The above entitled cause was tried before a jury commencing on April 8, 1958, and the verdict of the jury was returned on April 16, 1958. The jury returned its verdict in favor of the plaintiff and against the defendant in the sum of \$4,750.00. Judgment on the verdict was entered on April 28, 1958. Within the time provided by law, plaintiff moved this Court for its order vacating and setting aside that portion of the verdict and that portion of the judgment wherein and whereby said jury fixed and assessed plaintiff's damages in the sum of \$4,750.00, and for this Court's further order granting plaintiff a new trial on the sole and exclusive issue of the extent and nature of plaintiff's damages.

Said motion was made upon the following grounds: (1) Inadequate damages appearing to have been given under the influence of passion or

prejudice; and (2) insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages.

Within the time provided by law, defendant moved this Court for a new trial on the grounds: (1) that the Court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant; (2) that the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the court, and (3) newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action. The last ground was supported by affidavit.

The motions came on regularly to be heard by the Court on May 19, 1958. The plaintiff was represented by Conron, Heard and James, Wayne M. Hamilton appearing. The defendant was represented by Wild, Christensen, Barnard and Wild, Robert M. Barnard appearing.

In the amended complaint the plaintiff sought judgment against the defendant in the sum of \$22,-537.86 for damages alleged to have been caused by a chemical spray furnished to the plaintiff by the defendant for application on plaintiff's peach orchard.

Only two issues were submitted to the jury, which were: (1) Did the spray in fact cause any damage or injury to plaintiff's peach orchard? (2) If the



spray did cause any damage to plaintiff's peach orchard, then what was the nature and extent of the damage so caused?

The jury deliberated seven and one-half hours on April 15th and six and one-half hours on April 16th, 1958, before returning its verdict. Approximately forty-five minutes prior to the return of the verdict, several members of the jury, in response to inquiries by the Court, stated that the jury was hopelessly deadlocked and that further deliberations would be fruitless. The Court requested that the jury continue its deliberations and to reach a unanimous verdict, if this were possible without any juror surrendering his honest conviction solely for the purpose of reaching a verdict. The affidavit of the foreman of the jury was submitted at the hearing of the motions for a new trial. The defendant offered only slight affirmative evidence relating to the extent and nature of plaintiff's damages.

I have reviewed the record in this case, and I am satisfied that the undisputed evidence established that the plaintiff suffered minimum damages in the sum of \$9,919.00 which figure resolves all doubt as to the extent of damages against the plaintiff. Therefore, I am satisfied that the verdict of \$4,750.00 was inadequate under the evidence in this case, and in the language of the counsel for the plaintiff, indicates arbitrary and reckless disregard of the evidence.

As stated above, plaintiff, in his motion, seeks only a partial new trial—a new trial limited only

to the issue as to the extent and nature of the damages. It is my view, however, that under all of the circumstances of this case, a new trial should not be limited to the issue of damages, but should be had on both of the issues which were submitted to the jury. In my view of the evidence the causation of the damages was a difficult and close issue for the jury to decide. The verdict of the jury with respect to damages seriously undermines the integrity of the decision of the jury with respect to causation. It is not convincing to me to argue that the jury considered the evidence relating to causation with sincere judgment, in accordance with the law and the evidence, and that on the issue of damages its verdict was in reckless disregard of the evidence. The affidavit of the foreman of the jury does not answer the dilemma created by the inadequate verdict on damages.

To me, the gross inadequacy of the verdict of the jury on damages is quite convincing that the jury did not give proper consideration to the evidence on the issue of liability. A motion for a new trial is addressed to the sound discretion of the Court. It is the duty of the Court to see that both parties to litigation receive a fair and impartial trial, based upon the law and the evidence. In order to accomplish this duty, I feel that a new trial must be granted on the two issues which were submitted to the jury. I feel that I have the power to do so, even though the plaintiff has restricted his motion for a new trial only on the issue of damages.

Accordingly, It Is Ordered and Decreed that the

verdict of the jury heretofore entered herein, in its entirety be and the same is hereby vacated and set aside, and that a new trial be and the same is hereby granted on all issues which were submitted to the jury. It is further ordered that the defendant's motion for a new trial be and the same is hereby denied. It is further ordered that the above entitled cause is hereby placed on the calendar to be called Tuesday, July 8, 1958, at 10:00 a.m. for the purpose of setting this case for trial before a jury.

The Clerk of this Court is directed to forthwith mail copies of this memorandum and orders to all counsel.

Dated: May 22, 1958.

/s/ GILBERT H. JERTBERG,  
Judge U. S. District Court

[Endorsed]: Filed May 22, 1958.

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[Title of District Court and Cause.]

## NOTICE OF INTENTION TO APPEAL AND OF APPEAL

Comes now Charles W. Grimm, plaintiff above named, and hereby gives notice of his intention to appeal, and does hereby appeal to the United States Court of Appeals for the Ninth Circuit from, solely and exclusively, that portion of the Trial Court's "Memorandum and Order on Motions for a New Trial and Order Fixing Date for Re-Setting for Trial," made and filed in the above entitled cause

on May 22, 1958, wherein and whereby the following orders were made and entered:

1. That the verdict of the jury heretofore entered herein, in its entirety be and the same is hereby vacated and set aside;

2. And that a new trial be and the same is hereby granted on all issues which were submitted to the jury.

/s/ CONRON, HEARD & JAMES,  
/s/ By WAYNE M. HAMILTON,  
Attorneys for Plaintiff

[Endorsed]: Filed June 6, 1958.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Whereas, Judgment was entered in the above-entitled action on the 25th day of April, 1958, in the United States District Court, Southern District of California, Northern Division, in favor of plaintiff, Charles W. Grimm, and against defendant, California Spray-Chemical Corporation, a corporation;

And Whereas, plaintiff-Appellant, Charles W. Grimm, did thereafter on or about the 2nd day of May, 1958, move said United States District Court for a New Trial solely and exclusively on the issue of the extent and nature of plaintiff's damages;

And Whereas, on the 22nd day of May, 1958, the above-entitled United States District Court did make and enter its Order Denying Plaintiff's Mo-

tion for a New Trial on limited issues and did grant a new trial on the issue of causation as well as the issue of the extent and nature of plaintiff's damages, and plaintiff, Charles W. Grimm, feeling himself aggrieved by said Order Granting a New Trial has prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit from said Order;

New, Therefore, Phoenix Assurance Company of New York, incorporated under the laws of the State of New York and authorized by the laws of the State of California to execute bonds and undertakings as sole surety, and having an office and usual place of business at Bakersfield, Kern County, California, as Surety, hereby undertakes in the sum of \$250.00 that if the Order so appealed from is affirmed, or the appeal is dismissed, the appellants shall pay to plaintiff all costs awarded against it on said appeal, or such costs as the appellate Court may award if the judgment be modified.

Dated: June 3, 1958.

[Seal]      PHOENIX ASSURANCE COMPANY  
             OF NEW YORK, a Corporation,  
/s/ By RAY LOBRE,  
             Its Attorney-in-Fact

Affidavit of Certification attached.

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 59, inclusive, containing the original:

Judgment.

Clerk's notice of entry of judgment (copy).

Notice of intention to move for New Trial on issue of damages.

Motion for New Trial by Defendant.

Affidavit of Alwyn C. Sessions in support of Defendant's Motion for New Trial.

Defendants Memorandum in opposition to Plaintiff's Motion for New Trial on issue of damages alone.

Affidavit of James S. Peden, Jury foreman.

Affidavits in opposition to Affidavit of Alwyn C. Session.

Memorandum and Order on Motions for a New Trial, etc.

Notice of Intention to Appeal and of Appeal.

Designation of Contents of Record on Appeal and Statement of Points.

Designation of Additional Portions of Record on Appeal by Defendant.

B. Five volumes of Reporter's Official Transcript



of Proceedings had on: April 8, 9, 10, 11, 15 and 18, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: July 14, 1958.

[Seal]                      JOHN A. CHILDRESS,  
                                 Clerk  
/s/ By WM. A. WHITE,  
                                 Deputy Clerk

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[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 17, inclusive, containing the original:

Petition for Removal of action on ground of Diversity of Citizenship.

Complaint, attached to Petition for Removal (copy).

Answer of Defendant California Spray-Chemical Corp.

Supplemental Designation of Contents of Record on Appeal.

I further certify that my fee for preparing the



foregoing record, amounting to \$1.20, has been paid by appellant.

Dated: August 19, 1958.

[Seal]                      JOHN A. CHILDRESS,  
                                 Clerk  
                              /s/ By WM. A. WHITE,  
                                 Deputy Clerk

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In the United States District Court, Southern District of California, Northern Division

No. 1798—ND—Civil

CHARLES W. GRIMM,                      Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,                      Defendant.

### TRANSCRIPT OF PROCEEDINGS

Fresno, California, April 8, 1958

Before: Honorable Gilbert H. Jertberg, Judge presiding.

Appearances of Counsel: For Plaintiff: Conron, Heard & James, by Wayne M. Hamilton. For the Defendant: Wild, Christensen, Barnard & Wild, by Robert M. Barnard. [1\*]

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\* Page numbers appearing at top of page of Reporter's Transcript of Record.

Fresno, California, Tuesday, April 8, 1958. 10 a.m.

(A jury was duly empaneled and sworn.)

(Opening statement by Mr. Hamilton.)

(Opening statement by Mr. Barnard.)

Mr. Hamilton: We will call Kenneth W. Hench.

### KENNETH W. HENCH

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Kenneth W. Hench.

The Clerk: Have that seat.

### Direct Examination

Q. (By Mr. Hamilton): Your name is Kenneth W. Hench, is that correct? A. Yes, sir.

Q. Where do you reside, Mr. Hench?

A. 216 North Stern Road, Bakersfield, California.

Q. What is your business or occupation?

A. I am farm adviser employed by the Agricultural Extension Service of the University of California.

Q. Do you work out of the Farm Adviser's office of Kern County? A. Yes.

Q. Mr. Hench, what is the general type of work that you [3] do in your employ as a member of the staff of the Farm Adviser of Kern County?

A. Well, in my realm of work I am concerned with all horticultural crops, other than vegetable crops, in the County of Kern. It is my job to assist

(Testimony of Kenneth W. Hench.)

and advise farmers in problems pertaining to primarily tree crops, and vine crops, ornamentals, things of that nature.

The Court: May I suggest, let's all keep our voices up so the juror farthest away and counsel and everybody in the court room can hear, so if you will make an effort to do that, please.

Q. (By Mr. Hamilton): I take it from what you said, Mr. Hench, that part of your specialty in the Farm Adviser's office is in tree fruit?

A. Yes, sir, that is correct.

Q. Mr. Hench, where were you educated?

A. I received my Master of Science degree from the State College in Washington, Pullman, Washington.

Q. And what was that degree in?

A. The degree in agriculture; of course my major in horticulture.

The Court: Can all the jurors hear the witness? It is important that every juror hear everything that every witness says, so if at any time you don't hear either counsel's [4] question or the witness' answer, let me know, indicate it, because I want to be sure everybody hears everything that goes on. All right.

Q. (By Mr. Hamilton): When did you receive your Master's degree? A. In 1948.

Q. And did you go from there direct to the Kern County Farm Adviser's office?

A. No, sir, I—following my graduation I worked one year with the Agricultural Research

(Testimony of Kenneth W. Hench.)

Department of the Hawaiian Pineapple Corporation on the Island of Oahu. Following that I worked seven years for the New Mexico College of—A. & M. College, in—State College in New Mexico, as an instructor and a research worker.

Q. Did you say instructor and research worker?

A. Right.

Q. Did you have anything to do with peaches while you were employed by the New Mexico State College of Agriculture?

A. Yes, sir, I cooperated with the research work done there with peaches.

Q. Did the college have its own experimental peach orchard? A. Yes, sir.

Q. And how long have you been with the Kern County Farm Adviser's office? [5]

A. Two years last February.

Q. Are you acquainted with Charles W. Grimm?

A. Yes, sir, I am.

Q. Are you acquainted with various growers of Merrill Gem peaches in Kern County?

A. Yes, sir.

Q. Who are some of those other growers besides Mr. Grimm?

A. Well, there is the Grant Merrill orchard in Weed Patch—you want the names of them?

Q. Yes.

A. Kovacevich orchard—how many do you want me to name?

Q. Any more that come to your mind?

(Testimony of Kenneth W. Hench.)

A. Glen Moody orchard, Wheeler Ridge, the Ike Peters orchard near McFarland.

Q. Have you been in all of those orchards that you have named? A. Yes, sir.

Q. Had you been in all of those orchards, including Mr. Grimm's, prior to 1957?

A. Yes, sir.

Q. Prior to March of 1957, when were you last in Mr. Grimm's peach orchard?

A. I was in his orchard on February 27, 1957.

Q. At the time of your visit to that orchard on [6] February 27, 1957, how would you characterize the condition of that orchard using these terms: excellent, good, fair and poor?

A. I would characterize the condition as excellent.

Q. On that day did you notice any evidence of any disease of any kind? A. No, sir.

Q. In that orchard? A. No, sir.

Q. Did you notice any bad condition of any trees in that orchard? A. No, sir.

Q. After March 5th of 1957 when were you next in Mr. Grimm's peach orchard?

A. I was in his orchard on April 14th.

Q. That was 1957? A. 1957, right.

Q. And you had not been to the orchard between February 27th and April 14th of 1957, is that correct? A. That is correct.

Q. What was the condition of Mr. Grimm's Merrill Gem peach orchard as you observed it on April 14th?

(Testimony of Kenneth W. Hench.)

A. Well, of course, I was notified that something was wrong with his orchard, by one of my co-workers in the department. I had been out of the county for about a week prior [7] to the 14th, and when I returned I was notified by one of my co-workers that there was something wrong with his orchard and so I immediately went out there. It was on a Sunday, April 14th, and made a personal evaluation of the condition in the orchard and at that time I noticed extensive damage to the trees.

Q. Describe as best you can the condition of the trees as you saw it on that day?

A. Well, I noticed that the primary damage was confined mainly to the southern and southwestern sides of the trees. In many cases the scaffolds, the main branches on the north side of the trees showed no injury at all. You had a condition that was mainly on the side of the tree that was exposed more directly to the sun light, and there was quite a large percentage of the trees affected. There were some much more so than others.

Q. By bad condition, do you mean that the leaves were wilting, the leaves were dead, the leaves were falling? What was the condition of the foliage?

A. The leaves were wilted, and the tissue of the trees, primarily older wood, showed evidence of extreme injury of some sort.

Q. Now, did you walk through all of the Merrill Gem peach orchard? A. Yes, sir. [8]

Q. What else did you do by way of examination,



(Testimony of Kenneth W. Hench.)

other than to walk through it and to visually observe the trees?

A. Well, I checked the root system of the trees.

Q. Did you dig down and expose roots?

A. Yes, sir. Found no injury there. Checked the crown, or the portion of the trees just above the soil line; found no injury there. Found no apparent injury to the young wood.

Q. By young wood, what do you mean?

A. Well, wood that was laid down the previous year.

Q. In other words, that would be wood one year old or less?

A. Your fruit bearing wood.

Q. And when you use the term old wood, you refer to wood that was two years old or older, is that correct?

A. That is correct.

Q. Did you strip the bark from the limb?

A. Yes.

Q. Did you strip the bark from branches or twigs?

A. Yes.

Q. What did you observe, if anything, that was abnormal about the area of the plant material below the bark?

A. Well, there was quite a bit of killing of tissue in the affected portions, actually necrosis of the wood.

Q. You use the term necrosis. That means dead or dying, [9] is that correct?

A. That is right.

Q. How did you, by looking at it, determine



(Testimony of Kenneth W. Hench.)

that a bad condition existed? Was there a difference in color, difference in smell, in taste?

A. There was a difference in color of the bark and of the tissue. I cut in through the cambium layer of the wood and viewed the wood itself, and naturally when you have an abnormal darkening of the tissue, why, you know something is wrong.

Q. In other words, the condition that you observed was an abnormal darkening of the wood?

A. That is right.

Q. And would that condition also be applicable to what you refer to as the cambium?

A. Yes.

Q. What is the cambium, Mr. Hench?

A. Well, the cambium layer in plants is that area beneath the bark, just immediately beneath the bark of the tree which is the active growing area of your plant. It is commonly called the new genetic cells, that give rise to new cells which enlarge and increase the tree in diameter, and also it gives rise to your tissue, which we call vascular tissue, the valves and phloem; the phloem is important to transportation of food from the leaf, from the manufacturing [10] area of the leaf down to the roots. Ordinarily your xylem, the vascular system which carries your water and your mineral elements into your *tree*, and both of those vascular systems must remain healthy in order for the tree to stay alive and continue to be healthy.

Q. Would it be fair to say, Mr. Hench, that the cambium layer is the layer of growth, of life

(Testimony of Kenneth W. Hench.)

for the tree?           A. That is right.

Q. Did you find any evidence of any disease or bad condition in the roots?

A. No, I did not find any apparent abnormality whatsoever in the roots.

Q. On the areas above the ground, and the areas where you found this darkening of the cambium layer, would that darkening completely girdle the branch, or would it be part way round, or what did you observe?

A. It was varied; you had all degrees of girdling. By girdling, I mean the complete destruction of your cambium layer clear around the branch or the trunk, or your scaffold; you had all degrees of that injury.

Q. On the day that you were there, Mr. Hench, on April 14th, was there any fruit remaining on the branches or limbs that appeared to be seriously affected?

A. Yes, there was still some fruit persisting on the trees. However, it was just holding there, it was not growing, [11] being supported mainly by the life in the wood itself. There was a set of fruit on these branches and it persisted on the trees, the fruit did persist on the trees, but were not growing in a normal fashion like the fruit on unaffected trees were growing.

Q. Did you see anyone at the Grimm orchard on April 14th?           A. No, I did not.

Q. Mr. Grimm was not there with you?

A. No.

(Testimony of Kenneth W. Hench.)

Q. And no other person was with you?

A. No.

Q. Mr. Hench, did you at the time that you made this visit on April 14th know anything of Mr. Grimm's prior spray program?

A. I was told of his spray by my co-worker.

Q. I see. You were not informed of any spray program by Mr. Grimm? A. No.

Q. Then your knowledge of the prior spray program at that time was purely hearsay?

A. That is right.

Q. On this visit, and from what you have stated of your examination and what you found, Mr. Hench, was there anything, any condition, any symptom, any characteristic that you observed, that caused you to believe that there was any [12] pathogenic or infectious disease in the orchard?

A. Well, by the pattern of the injury it did not, in my opinion, appear to be a pathogenic disease. However, I wasn't certain.

Q. Now, by the use of the term pathogenic, what do you mean?

A. Meaning disease or mal function of your plant caused by an organism of some sort or other, whether it be bacteria, fungus or virus.

Q. In other words, by the term pathogenic you mean the flu bug type of disease carrier?

A. Well, I guess you could use that.

Mr. Barnard: I didn't hear that.

The Court: You have got to keep your voice up.

A. Yes, I imagine you could use that.

(Testimony of Kenneth W. Hench.)

Q. (By Mr. Hamilton): Bacteria, virus and fungus. A. Yes.

Q. At the time of this April 14th visit, Mr. Hench, did you form any conclusion or opinion as to what was the cause of the condition of the Grimm orchard?

A. No final opinion at that time.

Q. Did you form any opinion at all?

A. Yes, I believe I did.

Q. And what was that opinion? [13]

A. Well, I thought at the time it was probably associated with the spray.

Q. Did you at the time of this April 14th visit, Mr. Hench, gather some material from the Grimm orchard for the purpose of further examination of it? A. Yes, I did.

Q. How did you select the material that you did gather?

A. Well, I selected representative specimens from all sizes of wood, cut it off the trees, and placed them in a polyethylene bag, so it would not dessicate or dry out, and would be kept in a normal condition for future examination; collected that and carried it with me at that time.

Q. At that time what was it your intention to do with that material?

A. I intended to mail it to the extension pomologist at the University of California at Davis for diagnosis.

Q. Did that material eventually get to the University of California at Davis? A. Yes.

(Testimony of Kenneth W. Hench.)

Q. What was the means by which it got there?

A. The following Monday Dr. Proebsting from the department of pomology came through and stopped off for a short visit in the department there at Bakersfield, and I discussed the matter with him briefly, and told him that I was going to mail it to the University, and he said, "well, I am going [14] right up, I will take it with me," so he took the material with him up to the University of California.

Q. And did you later receive a report from the University of California at Davis concerning that material?

A. Yes, sir, I did.

Q. And who was that report given by?

A. Dr. Wilson of the department of pomology—I beg your pardon, director of plant pathology.

Q. After receiving that report, did you do anything further concerning efforts to try to discover what was wrong with the Grimm orchard?

A. Yes.

Q. What did you do, Mr. Hench?

A. Of course, immediately contacted Mr. Grimm and showed him the contents of that report. I made another visit to the orchard on the 19th of April, and following that I contacted Mr. A. D. Rizzi, who is the extension pomologist of the University of California at Davis.

Mr. Barnard: Excuse me. Mr. Hench, could you spell that name?

The Witness: R-i-z-z-i. Contacted Mr. Rizzi and

(Testimony of Kenneth W. Hench.)

asked for his help, personal help in looking over the trees.

Q. (By Mr. Hamilton): Did Mr. Rizzi come down?

A. Yes, he agreed to come down, and they flew down by [15] plane on April 25th. He was accompanied by Dr. Richard Harris of the department of pomology, and Dr. Hesse of the—who is chairman of the department of pomology.

Q. Did you take these gentlemen from the airport to the Grimm ranch? A. Yes.

Q. And did the four of you meet anyone at the Grimm ranch? A. Yes, we did, met——

Q. Who did you meet?

A. Met Mr. Grimm.

Q. Was Mr. Grimm there when you arrived at his ranch? A. Yes.

Q. Did you, Dr. Harris, Dr. Rizzi and Dr. Hesse and Mr. Grimm make an examination of the Merrill Gem peach orchard? A. Yes.

Q. Can you describe briefly what was done by way of examination?

A. Well, we went through and examined practically all the affected trees in the Merrill Gem orchard. By use of knives we cut into the branches, through the tissues, observed the extent of the killing of that tissue, the—by means of shovels dug out around the trees, examined the roots, and made a rather extensive field examination of the [16] trees.



(Testimony of Kenneth W. Hench.)

Q. While the four of you were there, did you discuss with Mr. Grimm his spray program?

A. Yes.

Q. Do you recall whether or not Mr. Grimm told you what he had last used by way of a spray?

Mr. Barnard: Now, if the Court please, I believe the conversation between the witness would be hearsay.

The Court: I think it would be hearsay. I will sustain the objection.

Mr. Hamilton: Very well, your Honor.

Q. Was that spray program generally discussed by Mr. Rizzi, Dr. Harris, Mr. Hesse, yourself and Mr. Grimm? A. Yes, sir.

Q. Was the condition of the orchard generally discussed by the five of you? A. Yes.

Q. Did you at that time, Mr. Hench, form any opinion as to the cause of this condition of the orchard?

A. Yes, my opinion was——

The Court: I think you can answer that just yes or not, whether you formed an opinion.

The Witness: Yes, sir.

Q. (By Mr. Hamilton): Now, was that opinion based upon virtually, based [17] upon what you yourself observed? A. Yes.

Q. Was it based partially on what you had observed on your prior visit of April 14th?

A. Yes.

Q. Was it based upon the discussion that you heard between Mr. Rizzi, Dr. Harris, Dr. Hesse



(Testimony of Kenneth W. Hench.)

and yourself and Mr. Grimm?           A. Yes.

Q. And what was that opinion?

Mr. Barnard: If the Court please, I believe that the opinion of the witness is not proper when it is based upon discussions with other people, and I object on that ground, that is, discussions other than determining the facts.

Mr. Hamilton: Your Honor, it is my opinion that a person becomes an expert by what he reads, that is written by others, what he personally observes, and in conversations with other experts in the same identical field.

The Court: Well, it seems to me, Mr. Hamilton, —I don't know whether this was a tentative opinion, but it seems to me what we are interested in here is the final opinion this witness may have arrived at, and I don't think it is helpful to get the stage views, that is the tentative, if I might use that expression, opinions formed at various stages. I think we are primarily interested in his final opinion, [18] and of course that should come after he has completed all of his examination, investigation, research and other things that he may have resorted to. I am going to sustain the objection to that question.

Mr. Hamilton: Very well, your Honor.

The Court: I think at this time, Mr. Hamilton, we will take our noon recess.

Members of the jury, I want you to keep in mind the admonition I have given you. Don't talk about the case or the witnesses or anything relating to

(Testimony of Kenneth W. Hench.)

the case among yourselves, don't permit any other person to communicate with you on any subject matter of this case and do not form or express any opinion on the merits of the case until that is finally submitted to you for verdict.

We will take our noon recess and we will reconvene at 1:30.

(Thereupon at 12:00 o'clock noon a recess was taken until 1:30 p.m. of the same day.)

Afternoon Session—1:30 p.m.

The Court: Do counsel stipulate the presence of the jury?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: So stipulated, your Honor.

KENNETH W. HENCH

a witness for plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Hamilton): Mr. Hench, be sure that you keep your voice raised so that the jurors can hear what you say, and so that the court reporter can get it down. After you, Dr. Hesse, Dr. Harris, Mr. Rizzi had completed your examination of the Grimm orchard on April 25th, Mr. Hench, did you do anything further in an effort to ascertain the cause of the condition of the Grimm orchard?

A. No, sir, I did not.

Q. Mr. Hench, either at or about the 14th of

(Testimony of Kenneth W. Hench.)

April, 1957, when you made your first examination of the Grimm orchard, after some difficulty had developed, or at or about the 25th of April, 1957, after the examination you conducted with Mr. Rizzi, Dr. Harris and Dr. Hesse, did you visit other Merrill Gem peach orchards in the immediate vicinity of the Grimm orchard? [20]           A. Yes, sir.

Q. Did you visit the John Kovacevich Merrill Gem orchard at or about that time?

A. I visited his orchard, and Mr. Moody's.

Q. How far is it from the Grimm Merrill Gem orchard to the Kovacevich Merrill Gem orchard?

A. Not more than a half a mile, I expect.

Q. How far is it from the Grimm orchard to the Moody Merrill Gem orchard?

A. Oh, approximately two miles.

Q. In either the Kovacevich or the Moody Merrill Gem orchards did you see any conditions similar to those you observed in the Grimm orchard?           A. No, I did not.

Q. Did the trees in the Moody and Kovacevich orchards appear to be healthy?           A. Yes, sir.

Q. No evidence of any disease of any kind?

A. That is correct.

Q. Mr. Hench, in the things you observed in your two examinations of the Grimm orchard, those examinations which you conducted primarily for the purpose of ascertaining what the cause of the condition of the orchard was, did you notice any pattern or symptom or characteristic that indicated

(Testimony of Kenneth W. Hench.)

to you the possibility that one of the elements in the spray [21] had caused the damage?

A. Well, I noticed that the damage, as I indicated before, was confined primarily to the more direct exposure to the sun, in other words, the south side of the trees, or southwest side of the trees. I noticed that the injury was also confined to older wood; in other words, the one year old wood was free of any tissue damage, whereas your crown or your root system were free any apparent damage. I would say those two things were the most outstanding in my mind.

Q. And what did those two characteristics indicate to you?

A. Well, it indicated to me that it was some external mechanical spray that did this injury. That was an opinion of mine.

Q. Is the injury predominantly on the southern or warm side of the tree a characteristic of oil injury?

A. That is right.

Q. I didn't hear your answer?

A. That is correct.

Q. Is an injury or darkening of the cambium predominantly in old wood, wood two years old and older, as opposed to young wood, one year old and less, characteristic of oil injury?

A. Yes.

Q. Mr. Hench, did you ultimately form an opinion as to the cause of the condition of the Grimm Merrill Gem peach [22] orchard?

A. Yes, I did.

Q. What was that opinion?

(Testimony of Kenneth W. Hench.)

A. My opinion was it was spray injury.

Q. Any part of the spray?

A. Well, I was thinking more in terms of oil injury, but I reiterate spray injury.

Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Mr. Hench, it is true, is it not, that the bark of a peach tree, or of any tree, is in the nature of a protection to the working parts of the tree which are underneath?

A. That is true to a certain extent. It is also a sponge to a certain extent.

Q. And it is true, isn't it, that the older the limb or the trunk becomes the thicker the bark becomes in that area? A. That is true.

Q. Now, what is it in an oil spray that would cause damage to a tree?

A. Well, you actually have a burning effect on the tissues when you have exposure to high temperatures or sun light. Usually when we recommend an oil spray, why, climatic conditions have to be such so that does not occur.

Q. And the burning effect is to the tissues under the bark? [23] A. Yes.

Q. So that the thicker the bark the more protection to those tissues and the less should be the effect, isn't that true?

A. Not necessarily. As your bark develops it also develops lenticels which are breathing pores in the wood or through the bark. In one year old wood

(Testimony of Kenneth W. Hench.)

you have more or less a protective coating by waxes which is—and which is also a smooth surface which would be more apt to shed and not hold the concentration of oil.

Q. Very well. Have you observed in your experience, Mr. Hench, cases of oil burn?

A. Not to this extent, no, I have not.

Q. Have you observed it to any extent?

A. No, I have not.

Q. So that your opinion that this was an oil burn because of the symptoms that were present is not based on anything that you in your experience have seen?

A. It is not based on personal experience, no.

Q. Now, you went out to Mr. Grimm's orchard first on February 28th, is that correct?

A. February 27th.

Q. February 27th. What was the purpose of that visit?

A. That was a farm call in the area.

Q. In other words, it is a part of your job in the Farm [24] Adviser's office to just call generally around the area upon various farmers from time to time?

A. That is correct.

Q. And this visit on February 27th was such a visit, was it?

A. That is correct.

Q. Mr. Grimm hadn't called you, or you hadn't called him?

A. Not to my knowledge.

Q. And at that time did you observe the condition of his peach orchard?

A. I did. I drove by the orchard; I did not



(Testimony of Kenneth W. Hensch.)

walk through it, however. I looked it over from the adjacent road of the orchard.

Q. Did you examine the orchard from the standpoint of looking for diseases or insects or organisms that might be present?

A. No, sir, I did not.

Q. So that your testimony that you saw no disease in the Grimm orchard is merely that in your casual examination you didn't see it?

A. That is correct.

Q. You weren't looking for anything at that time?      A. Not particularly.

Q. Did you discuss with Mr. Grimm any part of his farm program at that time, on that visit?

A. I do not recall exactly what the visit was composed of at that time.

Q. Did you see on Mr. Grimm's premises any containers or a supply of agricultural chemicals which was to be later applied to the orchard?

A. No, I did not.

Q. Did Mr. Grimm tell you that he had on hand the ingredients of a spray formula which he was going to apply?      A. No, he didn't.

Q. In other words, you didn't discuss that with him at all at that time?      A. No.

Q. Now, on April 14th, that is your next visit?

A. That is right.

Q. Do I understand that is the visit is the first time that you knew that anything was wrong?

A. That is correct.



(Testimony of Kenneth W. Hench.)

Q. Did you examine the Gold Dust peach trees at that time?

A. Not intimately, no, I did not examine them intimately.

Q. Did you examine the Blazing Gold trees on April 14th?

A. Not closely. I noticed no apparent injury to them, so I did not.

Q. You did know that they had been sprayed with the same substance, did you? [26]

A. That is correct.

Q. And you looked at those two orchards, or those two portions of the orchard, sufficient to see that they exhibited none of the same signs?

A. That is correct.

Q. Now, in the Merrill Gem portion of the orchard, exactly what did you see?

A. Well, I noticed that the leaves were wilted on the damaged side of the trees, the fruit that had set had adhered to the tree, they were not growing. I noticed that the tissue in the damaged trees was dead or dying. I noticed there was quite a variation in the pattern; however, the apparent damage in the trees was confined primarily to the south and southwest exposures of the trees.

Q. You did notice the fact that on the trunks on some of the major limbs there were dark spots?

A. Well, that was a matter of degree of injury. Some limbs were entirely damaged clear around, in other words, a complete girdling. Some limbs had a partial girdling, the north side of the branch

(Testimony of Kenneth W. Hench.)

would be still healthy and the south side would be damaged.

Q. You did see that?

A. I did see that, yes.

Q. And when you cut into the bark and into the cambium layer of some of these damaged limbs, was there a sour odor [27] present?

A. No, there was not.

Q. There was not. Was there coming from the dark portion of the limbs any oozing of gum or juice?

A. There was not any unusual pattern like that at all.

Q. You didn't see anything like that?

A. No.

Q. Had you seen an oozing of gum and had there been present a sour odor, would that cause you to think any differently about the cause of this disease?

A. Yes, it could have, if the pattern was uniform around the trees.

Q. I believe you stated that the pattern was arranged all the way from very little on one limb to all the way around on other limbs?

A. That is correct.

Q. And that, of course, is true also of various diseases that trees are subject to, that in some trees it will be more severe than in others?

A. Well, I don't think you will find on a disease one side of the tree mainly affected and the other side not affected.

(Testimony of Kenneth W. Hench.)

Q. But you will find a variation in the severity— A. That is true.

Q. —in different parts of the orchard? [28]

A. That is true.

Q. And also in different parts of the same tree? A. That is right.

Q. Now, Mr. Hench, are you familiar with a disease known as bacterial canker? A. Yes.

Q. Is that a disease which affects stone fruit trees in the San Joaquin Valley? A. Yes.

Q. And of course a peach tree is a stone fruit tree? A. That is correct.

Q. It is true, is it not, that one of the symptoms of bacterial canker is a darkness of the cambium layer? A. That is correct.

Q. And it is true also that one of the symptoms of that disease is a sour odor exuding from the cambium layer when a part is cut?

A. That is one of the symptoms.

Q. Of course; I don't mean in any of these questions to imply that any one of them is the total. And it is true also, is it not, that quite frequently the disease of bacterial canker attacks the south or the sunny side of the trees worse than the north side? A. I can't answer that, sir.

Q. In other words, you just don't know? [29]

A. It is my opinion that it can attack any side of the tree.

Q. Do you know whether it is frequently worse on the south? A. No, I do not.

Q. You don't know. Now, Mr. Hench, what in

(Testimony of Kenneth W. Hench.)

your opinion would be the reason that a substantial portion of the Merrill Gem orchard should be affected by an oil spray while none of the Blazing Gold or Gold Dust trees would be so affected, when they had all been sprayed at the same time?

A. There are degrees of sensitivity between various varieties to sprays; that is well established.

Q. That is what?

A. That is well established, that there are degrees of sensitivity.

Q. And would it be true that also the age of the tree might have something to do with it?

A. Possibly.

Q. And if the tree is older it wouldn't be as vitally affected as if it was younger?

A. To what specific problem? To oil?

Q. To oil injury? A. Oil injury?

Q. Yes.

A. I couldn't elaborate on that. [30]

Q. So I take it then that you don't know whether the age of the tree would have anything to do with that? A. That is correct.

Q. Now, referring once again to the disease of bacterial canker, Mr. Hench, does bacterial canker affect the root system of trees?

A. It is primarily above ground portions of the trees.

The Court: I don't know that is an answer to the question.

The Witness: I would say no, not to my knowledge.

(Testimony of Kenneth W. Hench.)

Q. (By Mr. Barnard): To your knowledge it does not affect the root system? Is that correct?

A. That is correct.

Q. And does bacterial canker affect the crown?

A. To my knowledge I believe it can.

Q. It can? A. Yes.

Q. Have you had any experience in examining a tree suffering from bacterial canker in which the crown was affected? A. No.

Q. So that in examining the trees in Mr. Grimm's orchard, the fact that you found no damage or injury to the root system would be just as consistent to the presence of a disease such as bacterial canker as it would to an oil injury?

A. That is true. [31]

Q. Now, this bacterial canker that we have been discussing, is that a well defined disease as it now exists in California?

A. To my knowledge it can be readily isolated.

Q. It can be readily isolated? A. Yes.

Q. And is it prevalent in California?

A. Prevalent in areas north of Kern County is my understanding.

Q. Prevalent in stone fruit trees? A. Yes.

Q. And it has been so prevalent for the last several years, has it not?

A. I believe so. I don't profess to be an authority on plant diseases. That is one reason why I sent the material in for the experts to examine the tissue.

(Testimony of Kenneth W. Hench.)

Q. You haven't had any particular training in diseases?

A. I have had courses in plant pathology, but I am not a specialist in that field.

Q. And are you a specialist in oil injuries?

A. No, I am not.

Q. Do you know, Mr. Hench, if you sprayed a tree with enough oil to kill it, would the damage occur all at once and almost immediately after the spraying, or would the tree continue to grow for a month or six weeks and then show [32] the injury?

A. Depends upon how much you put on, when you put it on, there would be several factors involved.

Q. And if you sprayed enough oil to affect the older limbs and the trunks where the bark was the thickest, what would be the effect on the new growth?

A. That depends upon the degree of girdling. If you completely girdled the tree, why, you would be apt not to have any growth from that limb. If there were a partial girdling you would have new growth from that portion of the limb which was undamaged, or from the lower portion.

Q. And by girdling, would you explain what you mean?

A. That is complete killing of your cambium around the branch or limb.

Q. In other words, if you killed it all the way around?

A. That is correct.



(Testimony of Kenneth W. Hench.)

Q. And having girdled the limb with the oil spray you would not have a development of fruit thereafter, is that correct? A. That is correct.

Q. And you would not have a development of leaves? A. That is correct.

Q. Now, on your direct examination you stated as one of the reasons which caused you to lean toward an oil injury was the fact that there was a difference in the pattern, or [33] the pattern indicated—I beg your pardon. Your statement was that the pattern indicated no pathogenic disease, and therefore by inference, in other words, that the pattern did indicate an oil injury. Will you explain what type of pattern you are talking about?

A. Well, I don't know of any disease offhand that would confine itself to one exposure of a tree. That is essentially what I had in mind. My mind was not set that this was oil injury by any means, when I first saw the orchard. That is the reason I thoroughly explored other possibilities. My mind was not set, this was merely an opinion.

Q. In the oil injury cases that you know of, is there usually a pattern present?

A. In the ones I have been told about there is a pattern such as we had out there, that is correct.

Q. And what is that pattern?

A. Well, a tendency toward more damage on the exposed portions of the tree and also on the older wood.

Q. All right. Now, at the time that you took the samples of wood which you later forwarded to

(Testimony of Kenneth W. Hench.)

Davis, do I take it by that that you actually cut off some of the dead limbs?

A. That is correct.

Q. And how large were the limbs that you cut?

A. Well, they were all degrees, some of them were fairly large. [34]

Q. And can you give us an estimate of the diameter?

A. Oh, two inches.

Q. Would that be the largest?

A. That would be, yes.

Q. And then you said they varied, so I assume that you also cut some that were smaller?

A. That is correct.

Q. Were the ones that you cut all completely dead?

A. Well, they looked to me like they were completely girdled, yes. I will say that.

Q. I take it then that they had no leaves on them?

A. Well, there could be some leaves holding to the damaged twig. I don't recall exactly whether the leaves were there.

Q. Do you recall whether there were any green leaves?

A. No, there were no green leaves.

Q. In other words, such leaves as there were would be dried up too, wouldn't they?

A. That is right.

Q. Some of which might not have fallen. Was there any fruit on any of these limbs?

A. Not to my knowledge.

(Testimony of Kenneth W. Hench.)

Q. Now, then, on April 25th, at the time you and a number of other gentlemen from Davis examined the orchard, you stated that you again cut into the branches? [35]

A. That is correct.

Q. And did you at that time observe any sour odor?

A. No odor that was particularly unusual, no.

Q. And were the cambium layers under those portions that you cut a dark color? A. Yes.

Q. And did you at that time observe the oozing of any gum or juice?

A. Not to any significant degree, no.

Q. Now, during the year 1957 you testified that you visited the other Merrill Gem orchards in Kern County, that is two others at least, and found nothing wrong. Did you at any time visit any peach orchards in Kern County that were suffering from any disease or diseases anywhere near in the nature of bacterial canker? A. No.

Q. Did you visit any in any other parts of the state? A. No.

Q. And in 1958, so far this year, have you visited any orchard suffering from bacterial canker?

A. No, I have not.

Q. And had you in 1956, then?

A. In 1956 I was not in this—well, I came here in 1956, February 1956. I did not, no.

Q. You did not. So that once again your knowledge [36] of the symptoms displayed by bacterial canker in the San Joaquin Valley on stone fruit

(Testimony of Kenneth W. Hench.)

trees is a knowledge which you have learned from your studies and not from personal experience?

A. That is correct.

Q. Now, it is true, isn't it, Mr. Hench, that there are other diseases somewhat in the nature of bacterial canker which are among the experts known by different names? A. Yes.

Q. In other words, to paraphrase it for us laymen, there are many diseases suffered by trees the same as there are diseases suffered by people which only an expert can really tie down?

A. That is correct.

Q. And there are also diseases which even an expert has difficulty in distinguishing one from the other?

A. Well, most of the diseases recognized in California can be isolated by the experts. I would rather have the plant pathologist answer that question.

Q. Now, Mr. Hench, you testified that you forwarded these limbs, branches, or whatever they were, to Davis? A. That is correct.

Q. And that you received a reply from Mr. Wilson? A. Yes.

Q. Do you have that report with you?

A. I do not. [37]

Mr. Barnard: Counsel, do you have the original?

Mr. Hamilton: The original is with Mr. Grimm's deposition.

Mr. Barnard: Is this a copy?

Mr. Hamilton: Yes.

(Testimony of Kenneth W. Hench.)

Mr. Barnard: If the Court please, I have in my hands a document which was identified as Defendant's Exhibit D in the deposition of Mr. Charles Grimm, which is a copy of the letter to which I have just referred, and I don't believe the original is available. I am satisfied with a copy if Mr. Hamilton is.

Mr. Hamilton: I am satisfied with the copy.

Mr. Barnard: May I show it to the witness?

The Court: Let's mark it Defendant's Exhibit A for identification.

(The document referred to was marked as Defendant's Exhibit A for identification.)

Q. (By Mr. Barnard): Mr. Hench, I hand you Defendant's Exhibit A for identification, and for the purpose of the record may I also identify it as being a document which is referred to in the deposition of Charles Grimm as Defendant's Exhibit D, and will you read that, Mr. Hench?

A. "Mr. Kenneth W. Hench"—

Q. No, read it to yourself.

A. Oh, I have. [38]

Q. Is that the report to which you referred as having been received from Mr. Wilson?

A. That is the report, right.

Mr. Barnard: Then I offer it, if the Court please, as Defendant's Exhibit A.

Mr. Hamilton: No objection.

The Court: It will be received and marked Defendant's Exhibit A. Do you care to read it to the jury?

(Testimony of Kenneth W. Hench.)

(The document heretofore marked as Defendant's Exhibit A for identification was received in evidence.)

Mr. Barnard: Defendant's Exhibit A is on the letterhead of the Cooperative Extension Work in Agriculture and Home Economics, State of California. With the Court's permission I will omit the balance of the letterhead, merely having reference to the telephone number, address, etc.

"April 16, 1957. Mr. Kenneth W. Hench, Farm Adviser, Post Office Box 791, Bakersfield, California. Dear Mr. Hench:

"Louis Probesting brought me the peach branches (Merrill Gem). There doesn't seem to be any infectious disease involved in this situation. The manner in which the trouble shows up only on the south side suggests an injury from an outside source. The damage is not typical of oil injury which should be worse in the tips of the leaves.

"Yours sincerely, E. E. Wilson, Plant Pathologist."

I have no further questions, Mr. Hench. [39]

#### Redirect Examination

Q. (By Mr. Hamilton): In counsel's examination, Mr. Hench, you and he referred to the crown of the tree. What portion or part of the tree did you refer to in your use of the term crown?

A. Well, that is the base of the tree, sir.

Q. Is that underneath the surface of the ground, or above the surface of the ground?



(Testimony of Kenneth W. Hench.)

A. Well, it is usually referred to as the area right at the ground.

Q. At the ground line. It is not the area below the ground where the roots join, or does it include the area of the trunk where the roots have joined?

A. It is that area where the trunk and roots join, but particularly at the ground level.

Mr. Hamilton: No further questions.

The Court: That is all, Mr. Hench.

Mr. Hamilton: May this witness be excused?

The Court: Do you have any further need of him?

Mr. Barnard: No, your Honor.

The Court: Mr. Hench, you are excused from further attendance, as far as the Court is concerned. Next witness?

(Witness excused.)

Mr. Hamilton: I will call John Kovacevich. [40]

### JOHN KOVACEVICH

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: John Kovacevich.

The Clerk: Have that seat.

### Direct Examination

Mr. Hamilton: Your Honor, in the ordinary course of events, I would have preferred to have presented all of the evidence concerning the cause of the injury prior to getting into the damage fea-

(Testimony of John Kovacevich.)

ture. However, Mr. Kovacevich is leaving the area tonight on a trip with a number of other persons, and informed me that if possible he should like to go on today. Therefore, in the matter of ordinary progression his testimony will be somewhat out of order.

Mr. Barnard: I have no objection.

The Court: All right.

Q. (By Mr. Hamilton): Your name is John Kovacevich? Is that correct? A. Yes.

Q. Where do you reside, Mr. Kovacevich?

A. 280 El Cerrito Drive, Bakersfield.

The Court: Mr. Kovacevich, you have to keep your voice up so the jurors can hear you. [41]

Q. (By Mr. Hamilton): Be sure and keep your voice up, sir, so that everyone can hear you. What is your business or occupation?

A. I am grower and shipper of fruits and vegetables.

Q. How long have you been engaged in that business? A. In excess of 30 years.

Q. Have you been engaged in that business in Kern County for 30 years?

A. Been in Kern County since 1928.

Q. Mr. Kovacevich, how much land do you own or have under your control in vineyards and orchards?

A. Oh, about 900 acres in Kern County.

Q. How much land elsewhere?

A. I farm around 240 acres in Riverside County.

(Testimony of John Kovacevich.)

Q. Is that also in orchards and vineyards?

A. Citrus and grapes.

Q. Are your operations in any other area?

A. That is all at the present time.

Q. In other words, a total of around 1150 acres, is that correct?

A. That is in vineyards and orchards. I farm some cotton also.

Q. The land that you operate in Kern County, in what particular area of that county is it located?

A. The Arvin, Wheeler Ridge area. [42]

Q. Any other areas?

A. In Kern County?

Q. Yes. A. No, that is about it.

Q. And the two places Riverside County, and the Arvin area of Kern County?

A. That is right.

Q. During those 30 years of vineyard and orchard operation, Mr. Kovacevich, have you yourself purchased and sold properties, lands in orchards and vineyards? A. I have.

Q. Have you heard of other sales over that period of time? A. Oh, I have, certainly.

Q. You yourself have planted peach orchards, have you not, starting with the seedlings and developing them to full maturity?

A. I started with plants that have been budded; not necessarily seedlings. Yes, I have planted several.

Q. How many acres of peaches?

A. Well, with this year's planting with peaches

(Testimony of John Kovacevich.)

and nectarines, slightly under 400 acres. That is growing at the present time, is that what you mean?

Q. That is correct. A. That is right.

Q. Your land in the Arvin area is immediately adjacent [43] to the land of Charles W. Grimm?

A. Well, we consider that the Wheeler Ridge area, that is what we would call it. I have a piece of property there, 240 acres across from Mr. Grimm.

Q. In other words, just across the fence line?

A. Imaginary line; actually it is a section line is all it is, quarter section line.

Q. You are familiar with Mr. Grimm's Merrill Gem peach orchard, are you? A. I am.

Q. Have you been in it many times?

A. Many times.

Q. Mr. Kovacevich, do you have an opinion of the fair market value of Mr. Grimm's Merrill Gem peach orchard, that is, value per acre, as that orchard existed on March 4th of 1957?

A. Yes, I have.

Q. What in your opinion was the fair market value of that land and the orchard?

A. Well, I would say about \$2,200 per acre.

Q. Mr. Kovacevich, since March 4th of 1957 have you been in Mr. Grimm's Merrill Gem peach orchard? A. I have.

Q. According to your best recollection, after March 6th of 1957 when was the first time you were in that orchard? [44]

(Testimony of John Kovacevich.)

A. Oh, I don't recall the exact time. I remember going into the orchard slightly before thinning time, which would be along the last part of April, I imagine. That is about the time.

Q. You are aware of the condition of the orchard?      A. Very well.

Q. Mr. Kovacevich, do you have an opinion of the fair market value of that orchard now?

A. I have an opinion, yes.

Q. And what is that opinion?

A. I would say about \$1,500.

Q. Per acre?      A. That's right.

Q. And I take it according to your opinion there has been a drop in the value of that peach orchard of \$700 per acre?      A. I would say so.

Q. Mr. Kovacevich, have you on your lands immediately adjacent to the Grimm lands, have you had any experience with frost damage?

A. Frost?

Q. Yes.      A. No, I have not.

Q. How long have you owned that particular piece of land?

A. I acquired it in 1946.

Q. In your operations in the Arvin area, have you had [45] any experience with frost damage?

A. To some slight degree in the spring.

Q. When?

A. Oh, it has been many years, I don't recall the exact year. We have had frost, some small degree of damage, I would say four or five times in some 30 years, never serious.

(Testimony of John Kovacevich.)

Q. It never was serious?

A. No. That is, we are speaking of tree fruit?

Q. Yes. A. Yes.

Q. What sort of tree fruits do you have in the Arvin area? A. Plums and peaches.

Q. And the tree fruit right next to Grimm's ranch? A. Peaches and nectarines.

Q. Mr. Kovacevich, have you ever used an agricultural chemical sold under the trade name of Mitox as a spray on peaches, or any other kind of tree fruit? A. Not to my knowledge.

Q. Mr. Kovacevich, do you use oil as a spray on your peaches?

A. We used a little oil this year. Last year we did not.

Q. Prior to this year have you used oil as a spray?

A. No, not to my knowledge. Again it is possible one of my men might have at times, but not to my knowledge.

Q. What percentage of oil did you use this past year? [46]

A. The only oil we used this past year was a dormant spray known as Fostex; I understand there is some oil in it. It is a different type of a spray than Mitox, I understand, and is supposed to be milder.

Q. You say the oil was in the chemical you used? A. Fostex was in oil.

Q. In oil. Do you remember the spray formula?

A. No, I do not. It was supplied by, as I



(Testimony of John Kovacevich.)

understand it is somewhat new, and we looked around for something that we wouldn't be afraid to use, and as a result we tried Fostex, but I can't tell you the definite results as yet.

Q. Have you ever used oil in the pink bud stage?      A. No, I have not.

Q. According to your experience and your knowledge as a grower of tree fruits for 30 years, what is your attitude toward the use of oil as a spray after the trees have broken dormancy?

Mr. Barnard: If your Honor please, I am going to object to that question.

The Court: I will sustain the objection to the question.

Q. (By Mr. Hamilton): Mr. Kovacevich, do you have an opinion as to whether or not the use of oil as a spray material after trees have broken dormancy is or is not dangerous?

The Court: Well, I doubt, Mr. Hamilton, if I can permit [47] the witness to answer the question. I don't think there is sufficient foundation laid for this witness or his experience in the use of any oil, or any spray containing oil, to permit him to answer.

Mr. Hamilton: Very well, your Honor.

Q. Mr. Kovacevich, if I remember correctly your earlier testimony you were in the Grimm orchard after it was sprayed on March 5th and 6th, 1957, and are familiar with its condition and appearances?      A. Yes, I am.

Q. Have you ever in your experience, Mr. Kova-

(Testimony of John Kovacevich.)

cevich, seen an orchard that showed generally the same symptoms or appearance as the Grimm orchard showed?      A. I have not.

Q. Your own Merrill Gem peach orchard, Mr. Kovacevich, in the spring of 1957 did it show any evidence of any bacterial disease of any kind?

A. Not to my knowledge. It looked very healthy.  
Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Mr. Kovacevich, have you ever seen a peach orchard that was suffering from any disease at all?

A. I sure have. Had them.

Q. And when that happened did every orchard in the [48] vicinity suffer from the same disease?

A. No.

Q. Do you know that there has been a large incidence of disease in peaches in the San Joaquin Valley in the last several years?

A. No, I can't say that I have. I am farming in the southern end.

Q. You have confined yourself pretty well to the Kern County end, is that correct?

A. That is right.

Q. And you haven't been up around Tulare County and Fresno County and Merced County looking at other orchards?      A. I have not.

Q. All right. Now, as far as your values are concerned, Mr. Kovacevich, have you seen Mr. Grimm's orchard recently?      A. I have.

(Testimony of John Kovacevich.)

Q. And is the opinion which you expressed as to its value after the disease, injury, or damage, an opinion based on what you have seen just recently?

A. My—you want me to answer that, explain my reasoning?

Q. Yes.

A. My opinion is based on the condition of the orchard last year at the time right after injury, and watching it practically through the summer. That is what it is based on. The tree in dormant stage, there isn't too much you can base [49] your opinion on.

Q. Are you assuming then that the trees this year, as they leaf out and put on fruit, and so forth, will be in the same condition as they were last spring when you saw them?

A. Well, my opinion is there will be a slight improvement in their condition.

Q. And your opinion of the value has allowed, has it, for that improvement? A. Yes.

Mr. Barnard: That is all.

The Court: That is all, Mr. Kovacevich.

Mr. Hamilton: May this witness be excused.

Mr. Barnard: Certainly he may be.

The Court: You may be excused. The next witness?

(Witness excused.) [50]

Tuesday, April 8, 1958. 2:15 P.M.

Mr. Hamilton: We will call Dr. E. E. Wilson.

## DR. EDWARD E. WILSON

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Edward E. Wilson.

## Direct Examination

Q. (By Mr. Hamilton): Where do you reside, Dr. Wilson?

A. 62 College Park, Davis, California.

Q. Your business or occupation?

A. I am professor of plant pathology at the experiment station at the University of California at Davis.

Q. Sir, where did you take your initial education?

A. I took two years at the University of Kentucky, went to the University of Wisconsin where I completed five more years work.

Q. When you finished your schooling did you obtain any degrees? A. I obtained——

Mr. Barnard: If the Court please, and Mr. Hamilton, I am willing to stipulate to Dr. Wilson's qualifications. [51]

Mr. Hamilton: Qualifications as an expert.

The Court: Members of the jury, counsel have stipulated to the qualifications of Dr. Wilson, as an expert in the field of plant pathology, or what would you call it?

The Witness: Plant pathology, diseases of plants.

(Testimony of Dr. Edward E. Wilson.)

The Court: Diseases of plants. Very well.

Q. (By Mr. Hamilton): Now, as a pathologist, plant pathologist, sir, your specialty is in connection with diseases of plants?

A. Diseases of fruit trees and nut trees is my specialty.

Q. Tree fruit, that is your specialty. Is that to the exclusion of injury that might be caused mechanically, or from a source other than a bacteria, or a virus or a fungus?

A. Not exactly. Incidentally, we receive numerous specimens during the period of a year and examine them, and in many cases some of those may be mechanical or other than infectious diseases.

The Court: Doctor, would you mind keeping your voice up a little. It is difficult for the jurors and all of us to hear.

The Witness: Incidentally at times we come in contact with injuries which are caused by other than infectious diseases but we—that is more or less incidental to our study of plant diseases. We are asked to examine specimens which may or may not turn out to be disease. [52]

Q. (By Mr. Hamilton): But the specimens that you might examine that were injured mechanically, or from some outside source, and I mean by outside source something other than within the tree or soil itself, would be only incidental to your specialty of examination for disease, infectious disease?

A. Yes.

(Testimony of Dr. Edward E. Wilson.)

Q. Is that correct?

A. I think, as I understand your question, we do consider the bacterial disease from an outside source, that is coming from the outside and entering the plant and causing the disease.

Q. Dr. Wilson, you never have been personally to the Charles Grimm ranch—— A. No.

Q. ——south of Bakersfield? A. No.

Q. But you did in the course of your work at Davis receive some plant material from a gentleman by the name of Louis Proebsting?

A. That is correct.

Q. And I assume from your report which has been read into evidence that this material which Mr. Proebsting delivered to you was identified as material from Merrill Gem peach trees—— [53]

A. Merrill Gem.

Q. ——from the Charles Grimm ranch?

A. No, I have no record of—nor remembrance of any source of this material. That is, I went back over records.

Q. Have you——

The Court: Just a minute. You complete your statement, Doctor, you have completed?

The Witness: Yes.

Mr. Hamilton: I am sorry, I didn't mean to interrupt.

The Court: I didn't know whether you had completed your answer. In other words, do you know from your own knowledge or from any rec-



(Testimony of Dr. Edward E. Wilson.)

ords the source of the material which you examined?

The Witness: No, I do not.

The Court: Do you know who delivered it to you?

The Witness: Dr. Proebsting, of the plant department.

The Court: Do you know about when he delivered it to you?

The Witness: I have no remembrance of it, except it must have been a day or so earlier, before my letter, which I think was dated April 16, 1957.

The Court: All right.

Q. (By Mr. Hamilton): You were informed by Dr. Proebsting that this material had been delivered to him by Kenneth Hench?      A. Yes. [54]

Q. And you were advised to address your report to Mr. Hench?      A. Yes.

Q. Now, what sort of an examination of that material did you conduct, Dr. Wilson?

A. I don't recall. We received numerous specimens during the year. Usually we make a visual examination, very much like a doctor would of a patient, examine for symptoms, and then usually I make a microscopic examination——

Mr. Barnard: If the Court please, I think that the witness should confine himself to testifying as to what he did in this particular case.

The Court: I think, Doctor, it isn't what you usually do. To the best of your ability and recollection what did you do in this particular case?

(Testimony of Dr. Edward E. Wilson.)

The Witness: I have no recollection of the incident regarding this specimen.

Q. (By Mr. Hamilton): At the time, sir, that your letter was addressed to Mr. Hench, what you had done by way of examination was fresh in your mind, is that correct? A. At the time.

Q. At that time, on April 16th, when you addressed this letter to Mr. Hench? A. Yes. [55]

Q. The original of this particular letter appears not to have been in the possession of any person involved in this action. What we have here is a copy. Would you look at that letter and identify it, as to whether or not that is the letter which you addressed to Mr. Hench?

A. I have a photostat of a carbon copy of this letter here if I could compare it. It appears to be the same wording. I would say that was the content of the letter.

Q. That is the letter. Thank you. In that letter, sir, you state "There doesn't seem to be any infectious disease involved in this situation." What did you mean by the use of the word "infectious"?

A. Caused by bacteria, fungus or a virus.

Q. In other words, your examination to you at least would eliminate the possibility of the presence of bacterial canker, bacterial gummosis——

A. Yes.

Q. ——sour sap—— A. Yes.

Q. ——or any other disease of which you have knowledge caused by a virus or a fungus?

A. Yes, that is correct.

(Testimony of Dr. Edward E. Wilson.)

Mr. Hamilton: You may cross examine. [56]

Cross Examination

Q. (By Mr. Barnard): Dr. Wilson, first of all, what do you mean by infectious disease?

A. A disease produced by an organism, usually microscopic in size, very small in size, bacteria, fungus or virus.

Q. Caused by any one of the three?

A. Any one of the three?

Q. Does it mean that a disease will spread, or does spread from tree to tree, the same as we think of an infectious disease in human beings?

A. Yes.

Q. Now, do you recall the material that was submitted to you in this case at all?      A. No.

Q. Do you recall whether it consisted of dead limbs or twigs, or whether or not some were alive?

A. I have no recollection of the material.

Q. You have none whatsoever?      A. No.

Q. Tell me, Doctor, if a bacteria, or fungus or virus is present in the limb of a peach tree and the limb dies, and is cut from the tree, will it be possible, or would it be possible in the future to determine whether or not that virus, that fungus, or that bacteria had existed prior to the [57] death of the limb?      A. Within a reasonable time.

Q. And for how long a period?

A. Oh, it is hard to say, some bacteria after the death becomes dried out. The bacteria may die

(Testimony of Dr. Edward E. Wilson.)

within a very few days, or the fungus probably survives somewhat longer.

Q. Are you familiar with the disease known as bacterial canker? A. Yes.

Q. And I take it from its name that is a bacteria? A. Bacterial disease, yes.

Q. And how long would a bacteria remain in a state that it could be discovered and recognized in a dead limb?

A. Oh, a week or ten days, if the material were not allowed to dry out.

Q. A week or ten days from the time it was cut from the tree? A. Yes.

Q. Or from the time the limb died?

A. Well, from the time the limb died, I would say.

Q. Now, you stated in your report, Dr. Wilson, there didn't seem to be any infectious disease involved in this situation. You meant by that, I take it, that you didn't find any bacteria, any fungus, any virus, present in these [58] tissues when you examined them?

A. I would say I found no bacteria or fungus involved. The virus would be more difficult, since it cannot be seen by the ordinary microscope. May I have an explanation here? Part of that statement is based on symptoms, of course, as well as microscopic examination.

Q. Based on the symptoms as they were described to you by someone?

(Testimony of Dr. Edward E. Wilson.)

A. Yes, that—symptoms and examination under the microscope.

Q. Now, if you had been told that the trees exhibited a dark—not a dark, but dark spots on the limbs and on the trunks from which the sap was oozing, and that the cambium layer where those spots were cut was dark and had a sour smell, would you have then thought that there didn't seem to be any infectious disease involved?

A. No.

Q. In other words, you would have thought that there was? A. Possibly.

Q. Possibly. In other words, the symptoms which I have described are symptoms which frequently occur when there is the presence of an infectious disease?

A. Of a certain disease, yes.

Q. Are those symptoms symptoms which appear with the presence of bacterial canker? [59]

A. Discoloration of the bark, of the cambium, and exudation of gum, are symptoms of bacterial canker.

Q. And how about sour—

A. Sour odor at times, exudation of gum and sour odor may or may not be present.

Q. And how about the presence of the bacterial canker on the south or the sunny side of the trees, is that something which frequently occurs?

A. Not to my knowledge.

Q. It is not?

A. You want me to elaborate on that?

(Testimony of Dr. Edward E. Wilson.)

Q. Yes, please.

A. In the course of some experiments I determined that bacterial canker could develop more rapidly on the south side, but it was not confined to the south side of the trees, not in relation to this disease.

The Court: I think the Doctor dropped his voice, and I didn't hear. Would you read it, Miss Schulke?

(Answer read.)

The Court: Did that complete your answer, Doctor? If not, you finish.

The Witness: I wish to apologize. This hearing aid makes me lower my voice.

The Court: Yes. Keep it up so we can all hear you. [60]

Q. (By Mr. Barnard): In other words, Doctor, then it is your testimony that bacterial canker would not be confined to the south side of the trees?

A. Yes.

Q. But would, shall we say, thrive more there?

A. Oh, possibly, if the temperature was more favorable.

Q. In other words, the growth of bacterial canker is dependent to a certain extent on temperature, is it? A. Temperature, yes.

Q. And in California in the spring time the temperatures on the south side of the trees are warmer than the temperatures on the north side, due to the fact the sun is farther south?

A. I presume so.



(Testimony of Dr. Edward E. Wilson.)

Q. So that it would be entirely consistent to get a more rapid growth of the bacterial canker on the south side of the trees?

A. That is a possibility.

Q. Now, your specialty is plant pathology. Have you done much work in detecting and examining strata? A. No, very little.

Q. And of course you didn't see Mr. Grimm's orchard? A. No.

Q. Do you recall if you have talked to anyone who [61] described in detail the conditions that existed there? A. No, I have not.

Mr. Barnard: That is all.

#### Redirect Examination

Q. (By Mr. Hamilton): Dr. Wilson, there is testimony in the record that Mr. Hench gathered the material which was delivered to you by Mr. Proebsting on April 14th of 1957. Your letter bears the date of April 16, 1957. A. Yes.

Q. Now, do you know of any bacterial disease, or fungus disease, the evidence of which would disappear within two days?

Mr. Barnard: Now, if the Court please, I am going to object to that as being argumentative, being cross examination of counsel's own witness.

The Court: I think it is argumentative, Mr. Hamilton. You can certainly inquire of the witness, I think, on redirect as to the length of time that evidence may still be present. I think the witness

(Testimony of Dr. Edward E. Wilson.)

has indicated that already, but you certainly may ask it again.

Q. (By Mr. Hamilton): Between April 14th and April 16th, would the evidence of the presence of an infectious disease remain on that material?

A. If it was properly preserved, yes, not allowed to dry out, yes.

Q. Now, do you recall whether or not the material was in the bags which are designed——

A. I have no recollection of the material whatsoever.

Q. Dr. Wilson, as a plant pathologist, it is possible to raise by culture, or grow the bacteria that produces bacterial canker or gummosis?

A. It is, yes.

Mr. Hamilton: I have no further questions.

### Recross Examination

Q. (By Mr. Barnard): I have just one question, Dr. Wilson. In answer to Mr. Hamilton's question, that bacteria would be found on April 16th in a sample submitted on April 14th, I didn't quite hear your answer. I believe you stated that it was alive to begin with.

A. If the bacteria were alive to begin with, if the material was properly preserved, not allowed to dry out.

Q. And if the limb had already been dead for an unknown period of time you might or might not find the evidence of bacteria?

(Testimony of Dr. Edward E. Wilson.)

A. For a length of time, yes, for quite a period of time.

Mr. Barnard: I would like to ask permission of the Court to ask one or two questions that I probably should have asked [63] originally.

The Court: All right.

Q. (By Mr. Barnard): Dr. Wilson, would you explain or tell the jury the symptoms exhibited by a peach tree which is suffering from bacterial canker?

A. That depends on the part attacked. Bacterial canker may attack almost any part of the tree, enter through the blossoms, through the buds, twigs, large branches. The most—the most destructive symptoms are those on the branches, cause a large dead, discolored area of the bark. This bark may or may not be sour smelling, it may or may not exude gum. That is just about the principal symptom.

Q. Are the roots affected?

A. Seldom, if ever.

Q. And the crown?

A. The disease area may extend to the ground level, that is to the crown, but seldom ever below the ground.

Q. And is there any difference between the old and the new wood, as to which might be affected first or the most?

A. No; the old wood may become infected from the fact the bacteria entered a young twig and moved down into the old wood, or the infection may

(Testimony of Dr. Edward E. Wilson.)

occur through wounds or through natural openings.

Q. In other words, the damage appears wherever the [64] infection—— A. Yes.

Q. ——occurs and it can occur any place on the tree? A. Yes.

Q. Now, what is the effect on the leaves and the fruit?

A. Direct infection of the leaves may cause small spots to appear, and brown circular spots. If the branch is killed the leaves of course wither. If the branch is infected itself, the leaves may wither and die.

Q. And would fruit that was on those branches also then wither? A. Wither.

Q. In other words, it would quit growing?

A. I didn't get the last.

Q. In other words, fruit would quit growing and stop at whatever state of development it was at the time of the attack? A. Yes.

Mr. Barnard: That is all.

Mr. Hamilton: I have no further questions.

(Witness excused.)

The Court: We will take our afternoon recess, and during the recess remember the admonition I have given you.

(Short recess) [65]

The Court: The jury is present, gentlemen?

Mr. Barnard: So stipulated, your Honor.

Mr. Hamilton: So stipulated, your Honor. Call Frank Hornkohl.

**FRANK HORNKOHL**

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Frank Hornkohl.

The Clerk: Have that seat.

Mr. Hamilton: May the record show, your Honor, that this witness is called under, I believe, Section 43-B, or the equivalent to Section 2055 of the State Code, as an employee of Cal-Spray.

Mr. Barnard: If the Court please, I do not agree that he is an employee of Cal-Spray. I will state the fact that Mr. Hornkohl was employed by the defendant to make a certain study of Mr. Grimm's orchard, and he did that on our behalf.

Mr. Hamilton: Then he was employed by Cal-Spray?

Mr. Barnard: He was employed as an independent contractor for that limited purpose. Now, whether that makes him an employee within the Code section, I don't know.

The Court: Just let me find the code section. Would counsel approach the bench?

(The following proceedings were had at [66]

the bench, outside the hearing of the jury:)

The Court: Now, 43-B says "A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party."

(Testimony of Frank Hornkohl.)

Mr. Hamilton: Referring to 43(a), that particular portion which authorized the use of state procedural rules and in any case the State rule which fixes the reception of evidence.

Mr. Barnard: I believe the State rule, as far as 2055—

The Court: I think it is much broader.

Mr. Hamilton: It has been revised.

The Court: The only question in my mind, of course, is under the statement of Mr. Barnard. I think you will have to develop that and then I will rule on it.

Mr. Hamilton: I did not expect Mr. Barnard to admit the employment. I think from the testimony of the witness I can show he was employed for this purpose.

Mr. Barnard: There is no question about that, but as an independent contractor.

Mr. Hamilton: 2055 as revised, I believe in September of this past year, now includes employees.

The Court: Yes, I realize that, but what is in my mind [67] now is that after the events have taken place a party employs somebody to make an investigation of those events, whether that is the type of employee the statute contemplates, or whether it doesn't contemplate a person who was employed during the period during which these events occurred.

Mr. Hamilton: I think I can establish that Mr.



(Testimony of Frank Hornkohl.)

Hornkohl placed himself still in the employ and still in the confidential relationship with Cal-Spray.

Mr. Barnard: That would not be material.

Mr. Hamilton: At all times.

The Court: Was he an employee of Cal-Spray, we will say, in March of 1957?

Mr. Barnard: No.

Mr. Hamilton: No, he was as I understand it, and I have very limited information, employed by Cal-Spray to make a survey of the orchard to ascertain the extent and nature of the damage, the cause of the damage, and advise Cal-Spray concerning those matters. He is a chemist who, as I understand it, analyzed the chemical reactions.

Mr. Barnard: That was in August of 1957, and that has been his only employment.

Mr. Hamilton: That is directed toward the things at issue here, what caused the damage, and the nature and extent of it.

The Court: What is the case on this? [68]

Mr. Hamilton: I do not have one.

Mr. Barnard: I didn't look because I didn't expect Mr. Hamilton to call him.

Mr. Hamilton: Well, Mr. Hamilton called him because Cal-Spray had employed him for that purpose.

The Court: I am inclined to feel that a person would have to be an employee at the time of the happening of the events, and not be a person who is employed specifically to investigate and give an opinion relating to the effects of the events. That

(Testimony of Frank Hornkohl.)

would be the way I would view it as an adverse witness.

Now, if overnight you folks can do further research on it, I am always happy to change my mind if I am wrong.

Mr. Hamilton: I am in the peculiar position of knowing absolutely nothing of what Mr. Hornkohl's testimony would be, and on the basis of the admonition in 43(a) for a broad or liberal interpretation, and the fact that he was an employee, I felt it proper to call him as an adverse witness.

Mr. Barnard: I think Mr. Hamilton is misinterpreting the word employee. He has been an independent contractor employed to do a job.

The Court: Well, I am inclined to feel, Mr. Hamilton, presently that I would not permit you to cross examine him under the statement made. If you want to examine him on the foundation now, I will rule formally a little later as to [69] whether I will or will not permit it.

Mr. Hamilton: Let me go into the foundation then.

Mr. Barnard: Yes.

The Court: All right.

(The following proceedings were had in the hearing of the jury:)

#### Direct Examination

Q. (By Mr. Hamilton): Mr. Hornkohl, where do you reside?

A. I reside at 245 El Cerrito Drive, Bakersfield, California.

(Testimony of Frank Hornkohl.)

Q. What is your business or occupation, sir?

A. I am a graduate consulting chemical engineer, and I own and operate the Hornkohl Laboratories in Bakersfield.

Q. Mr. Hornkohl, were you sometime during 1957 employed by California Spray-Chemical Corporation to do certain work for them?

A. Yes, I was.

Q. What were you employed to do?

The Court: May we find out first, Mr. Hamilton, when?

Q. (By Mr. Hamilton): When were you employed by Cal-Spray?

A. On or about August 6, 1957.

Q. And what were you employed to do?

A. To make an examination of Mr. Grimm's ranch and to determine the extent of damage to his fruit trees. [70]

Q. Were you in any way employed to ascertain the nature or cause of the damage?

A. Yes, if possible.

Q. You, sir, went to Charles Grimm's ranch and in conversation with him informed him of this employment, is that correct?

A. That is correct.

Q. And you sought his permission to go into his orchard and do whatever you felt was necessary?

A. That is correct.

Q. And that permission was given to you by him? A. Yes.

Q. In the recent past, Mr. Hornkohl, and by that

(Testimony of Frank Hornkohl.)

I mean within the last day or so, did I come to your laboratory to talk to you about the work you had done for Cal-Spray?      A. Yes.

Q. And is it not correct, sir, that you refused to give me any information as to what you did, or the results of your study?

A. That is correct.

Q. And the reasons that you gave were that you were employed by Cal-Spray, is that correct?

A. That is correct.

Q. And you owed a confidential relationship to Cal-Spray that would prevent you from disclosing the material which you [71] had gathered?

A. That is correct. That is my policy in all my work.

Q. At the time, sir, of your employment by Cal-Spray were you informed that your examination and the results thereof would like be used in a legal action?

A. I don't recall, no—I don't recall at that time that was—yes, I believe it was, there was a possibility of a legal action.

Q. In your own mind at the present time, do you regard yourself as still employed by Cal-Spray for that purpose?

A. As far as this report is concerned, that is their property, yes, sir.

Mr. Hamilton: I again ask leave of the Court to examine this witness as an adverse witness.

The Court: May I ask you, Mr. Hornkohl, I un-

(Testimony of Frank Hornkohl.)

derstand your business is operating and maintaining this laboratory?

The Witness: Yes, sir.

The Court: And are your services available to anybody who may seek your aid?

The Witness: That is right.

The Court: And is the work done by you based upon your own judgment and discretion, or does somebody tell you the details of what you have to do?

The Witness: Well, ordinarily they tell me what they want me to find out, and they leave it up to me to go ahead and [72] follow my own methods.

The Court: I think, Mr. Hamilton, that under the law I will have to rule that you cannot call this witness as an adverse witness.

Mr. Hamilton: May I have a reservation, sir, in this respect: if I may ascertain from cases overnight that it is proper, may I have leave of the Court to recall this witness?

The Court: Oh, yes. I will make my ruling subject to review if you care to have me review it, and if you find some cases I am always willing and ready to change my mind if I am wrong.

Mr. Hamilton: Thank you.

The Court: I want to say this, that the Court is not ruling, of course, that you can't call this witness as your own witness. The only thing I am ruling is that at the present stage I rule you cannot call him as an adverse witness.

(Testimony of Frank Hornkohl.)

Mr. Barnard: If the Court please, may I state also, we are not too far from the evening adjournment, and as far as Cal-Spray is concerned, we have no objection to Mr. Hamilton discussing this matter with Mr. Hornkohl this evening. I appreciate Mr. Hornkohl's feeling the other day when you called on him. We don't object, it is simply that we don't feel under the law he is an adverse witness. But if overnight you want to talk to Mr. Hornkohl, you have our permission.

Mr. Hamilton: From your statement, counsel, Mr. Hornkohl [73] may feel relieved of any confidential relationship presently existing between himself and Cal-Spray?

Mr. Barnard: Yes.

Mr. Hamilton: Thank you very kindly.

Q. Mr. Hornkohl, I understand that you are under a subpoena to appear in a legal action in Kern County tomorrow, is that correct?

A. That is correct.

Q. I also understand that it would be possible for you to return here on Thursday, is that correct?

A. That is correct.

The Court: Well, I am hoping, gentlemen, if we move along that we may not be involved in this trial on Thursday.

Mr. Barnard: If the Court please, I hate to be discouraging, but I don't think that is possible.

The Court: Well, one never knows if we move along.



(Testimony of Frank Hornkohl.)

I will say this to you, Mr. Hornkohl, that you are here in my court, and you are subject to the orders of this Court, and I will expect you to be here tomorrow unless between now and then you are relieved, and it makes it bad on a witness to be caught between cross fires of two courts.

The Witness: I was already subpoenaed in the other case prior to this.

The Court: Well, I must rule you are subject to the orders of this Court. [74]

The Witness: Oh, I see. I didn't know.

The Court: And so you remain in attendance unless we make some other arrangements about it.

The Witness: All right, sir.

The Court: Do you care to examine him further now?

Mr. Hamilton: Not at the present time, your Honor.

The Court: You may step down.

(Witness excused)

Mr. Hamilton: I will call Dr. C. O. Hesse.

### C. O. HESSE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: C. O. Hesse.

The Clerk: Have that seat.

### Direct Examination

Q. (By Mr. Hamilton): You are C. O. Hesse, are you?  
A. Yes.

(Testimony of C. O. Hesse.)

Q. Is that the correct pronunciation of your name, Hesse?      A. Hesse.

Q. Your business or occupation, sir.

A. Professor of pathology and pomology, experiment station, University of California at Davis.

Mr. Barnard: What was that, pathology? [75]

The Witness: Pomology.

Q. (By Mr. Hamilton): Where did you take your initial schooling, sir?

A. University of Hawaii, Pasadena Junior College, University of California at Davis, and graduate work at University of Maryland, College Park, Maryland.

Q. What degrees have you obtained, sir?

A. A B.S. degree, and Doctor of Philosophy.

Q. Any other degrees?      A. No, sir.

Q. How long have you been a professor of pomology at the Agricultural College at Davis?

A. Ten and a half years.

Q. What did you do prior to that time?

A. I was employed by the U.S. Department of Agriculture.

Q. In what capacity?

A. As a geneticist.

Q. That is a plant breeder, is that correct?

A. Yes, in plant breeding, tree fruit breeding.

Q. Your specialty in the department of pomology has to do with tree fruit?

A. Yes, sir, tree fruit breeding specifically.

Q. You, sir, visited the Charles Grimm Merrill Gem peach orchard in April of 1957, did you not?

(Testimony of C. O. Hesse.)

A. I did. [76]

Q. And you were in the company of one Al Rizzi? A. That's right.

Q. And Dr. Richard Harris? Is that correct?

A. Yes.

Q. And also of Kenneth W. Hench?

A. Yes.

Q. That was, I believe, April 25th.

A. I do not recall the exact date, but it was in April.

Q. Who is Dr. Richard Harris?

A. Dr. Richard Harris was at the time assistant pomologist in the department of pomology at Davis, and has presently been transferred to another department of the University.

Q. Who is Al Rizzi?

A. Al Rizzi is extension specialist in pomology stationed at Davis.

Q. What were the circumstances under which you visited the Grimm ranch? In other words, what caused the three of you to make the trip to the Grimm ranch?

A. Dr. Harris and Mr. Rizzi told me they were visiting Kern and Fresno Counties to see extensive damage in orchards and asked me if I wanted to accompany them, and I did.

Q. The three of you were taken to the Grimm ranch by Kenneth Hench, is that correct?

A. That is correct. [77]

Q. And you made an examination of the Grimm Merrill Gem peach orchard, is that correct?

(Testimony of C. O. Hesse.)

A. Yes.

Q. Just explain briefly, sir, what you did by way of examination of that orchard.

A. We walked over probably between one-third and one-half of the orchard nearest to the buildings on the Grimm ranch, looking particularly for a pattern in the injury which was obvious, extended clear through the orchard. We peeled back and cut into the bark on the limbs as high as we could reach, even climbing the trees. We did not do extensive digging around the roots because we had been informed by Mr. Hench that he had dug extensively and found no root injury. Essentially that is the type of observation we made.

Q. First, sir, as to the overall appearance of the orchard, just visually, standing off looking at the orchard, did you notice anything abnormal or unusual?

A. Yes, many of the limbs were in a state of collapse, some foliage had emerged that at the time we visited was still green, but was completely collapsed and drying. The normal parts of the trees were well leafed out, and the contrast was very striking. There was no difficulty in seeing the damage.

Q. On your examination of the limbs, branches, the area above the surface of the ground, as I believe you [78] expressed it, you took a knife and peeled the bark back, did you see anything abnormal or unusual?

A. Yes, the wood from two years old down to

(Testimony of C. O. Hesse.)

the crotch of the tree particularly, there were brown areas in the cambium, in the bark, in the cambium and in the new wood, or last year's wood as the case might be, it was probably last year's wood but still living wood, which in most parts centered under the lenticel opening in the bark. And this was quite common, and some were severely damaged branches, or on the most severely damaged sides of the branches, there might be actual streaks of injured cambium and sapwood tissues.

Q. Would you, sir, explain to the jury what you mean by lenticel openings?

A. Well, lenticular openings are natural openings in the bark of many trees, especially those in which the peach is classified; they are actual openings in the under-side of the lenticel, which is a spongy, very loose mass of cells, and it affords a ready entry for gases, liquids, anything applied to the surface, there is no barrier there. It is an actual opening into the living bark area, where you come to living cells.

Q. Do those lenticel openings, or lenticular openings continue to exist throughout the life of the tree?

A. They will exist until the bark becomes rather old and [79] quite thick, in which case the cambium underneath may cut them off and more or less discontinue them, but certainly in a peach tree for the first ten years they are quite noticeable on the branches.

(Testimony of C. O. Hesse.)

Q. Do the lenticular openings get larger as the tree grows older, or that particular opening grows older?

A. As long as they exist they tend to elongate to some extent, especially in the first two or three years of their existence as the branch increases in diameter.

Q. Did you in your examination of the orchard notice any preponderance of injury to any particular side or area of the trees?

A. We looked at the orchards from that standpoint, perhaps in an overall survey we thought perhaps more limbs on the south side were killed, but it was not such a definite pattern we could conclude at that time that one side of the trees was more badly damaged than the other in all instances.

Q. In your capacity as a professor of pomology, you are familiar, are you not, sir, with the various infectious or pathogenic diseases of peach trees?

A. In a superficial manner, not in the manner of a plant pathologist.

Q. Did you, sir, notice any evidence or symptoms that were characteristic of any disease of peach trees, pathogenic disease of peach trees, in the Grimm orchard? [80]

A. No.

Q. You are familiar, are you not, sir, with the characteristics and symptoms of bacterial canker?

A. Yes, sir.

Q. You are familiar with the symptoms and characteristics of the bacterial disease called sour sap?



(Testimony of C. O. Hesse.)

A. That is a multiplicity of diseases, not a single one. Several things may cause sour sap.

Q. But you are familiar with it?

A. At least with the more common causes of so-called sour sap.

Q. Did the symptoms that you saw in the Grimm orchard correspond to those characteristics of any disease which you knew about from your reading, your experience, or your learning?

A. If it had been an isolated limb, I think one would have been suspicious, but with the preponderance of numbers that immediately was placed in our minds practically eliminated the disease factor, plus Mr. Hench's statement there was nothing wrong with the roots because he had dug around them previous to our visit.

Q. You met Mr. Grimm when you got to his ranch on that particular day? A. Yes, sir.

Q. Did you discuss with Mr. Grimm his spray program? [81]

A. He told us what had been applied and approximately when. I have no accurate recollection of the actual program, except an oil had been used and there were other amendments with it, or other spray materials.

Q. Do you recall the amount of oil that Mr. Grimm indicated he used?

A. My recollection is four per cent.

Q. Do you recall the type of oil that he stated he used?

(Testimony of C. O. Hesse.)

A. I believe at the time he called it a medium oil.

Q. I believe the principal abnormality that you discovered in peeling the bark you described as a browning of the cambium layer immediately below the lenticular opening, is that correct? A. Yes.

Q. Would that browning completely girdle the limb, or would it girdle some limbs but not others, or would it be less girdling in all cases?

A. Most of the limbs were not completely girdled by contiguous or overlapping brown areas. However, they were very numerous and I think it was our feeling at the time that actual damage extended beyond the—possibly beyond the actual area of browning. The brown cells were undoubtedly dead cells; others nearby may have been injured and not brown. But certainly there were enough in total extending up and down the limb as well as around it so [82] that it would be a very abnormal condition, and in my estimation certainly could have caused severe damage or death to the limbs.

Q. Sir, is the browning or burning, or necrosis of the cambium layer under the lenticular openings confined almost entirely to older wood, wood one year old and older—pardon me, two years old and older, with slight, if any, indication of damage on wood one year old or less, a characteristic of oil injury? A. I don't know.

Q. Did you, sir, form an opinion from your examination of the Grimm orchard, and your knowledge of the use of the oil as a part of the spray

(Testimony of C. O. Hesse.)

program, as to the cause of the condition of the orchard? A. Yes.

Q. And what was that opinion?

A. They said it was not only based on Mr. Grimm's orchard, but on other orchards observed, we felt it was due to the use of oil under the conditions which prevailed in 1957.

Q. I want you, sir, to accept this as a fact. I am going to ask you a hypothetical question. But accept it as a fact that the pattern of complete destruction, death of the primary limbs in the Grimm Merrill Gem peach orchard, the same orchard that you investigated, later developed to be predominantly on the southerly or southwesterly exposure of the tree. Just assume that to be a fact, and [83] putting that together with your observing of the browning or necrosis of the cambium layer, as you have described it, would that ultimate result of the preponderance of injury on the southerly side be a characteristic of oil injury?

A. Well, I don't know quite how to answer. You ask me to accept the fact the damage was on the southwest.

Q. Yes.

A. Whether that is a characteristic of oil injury, I truly cannot say.

Q. Sir, from your experience, from your reading, from your learning, does the temperature have any effect on the possibility of injury to stone fruit trees by oil?

(Testimony of C. O. Hesse.)

A. Well, it has been definitely shown very low temperatures have an effect, and the indications are that extremely abnormal high temperatures can also increase injury.

Q. In other words, abnormally high temperatures would increase the possibility of injury, is that a correct statement? A. Yes.

Q. By abnormally high temperatures, what do you mean, sir?

A. Well, most of the work has been reported, of course, as foliage sprays rather than dormant sprays, early season sprays, so that the abnormally high temperatures are probably 85 and higher. I have no direct experience in the intermediate temperature zones. [84]

Q. Would that abnormally high temperature relate itself to the particular season of the year, or the particular status of the tree, or would there be any inter-relation between that high temperature and the season? The point I am trying to make, sir, is that for the month of March an abnormally high temperature might be 70 degrees, whereas for the month of July an abnormally high temperature might be 110 degrees.

A. Unfortunately, sir, there is very little information on that for the very simple reason it is a very peculiar time to apply oil spray, the normal spray schedule does not call for it.

Q. In other words, a spray schedule using oil in the pink bud stage is abnormal, is that what you are saying?

(Testimony of C. O. Hesse.)

A. I would certainly think so for peaches.

Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Dr. Hesse, you stated that you came to Kern and Fresno Counties in April of 1957, accompanying Mr. Rizzi,—Dr. Rizzi and Dr. Harris? A. Yes.

Q. For the purpose of seeing extensive damage in orchards, is that true? A. Yes, sir.

Q. Did you then visit other orchards, other than Mr. [85] Grimm's? A. Yes.

Q. And what orchards did you visit?

A. I can't call them by name, except one belonged to Mr. Estes, I believe the name is, near Fresno, east of Fresno, and another one, orchard North of Reedley, the owner's name I do not recall. I never met him before.

Q. All right, then, in other words, during this particular trip you visited three orchards?

A. Yes, sir, and drove by others.

Q. And was the same condition prevalent in all three orchards that you examined?

A. Essentially, yes, due to age of trees, sometimes the injury looked a little different, more severe or less severe, but it was essentially the same.

Q. In other words, what I meant is you were examining orchards which were substantially in the same condition? You weren't looking at orchards suffering a different disease or different injury altogether?

(Testimony of C. O. Hesse.)

A. We did not make extensive and exclusive surveys of these other orchards; we saw the type of injury and saw it repeated and therefore did not feel it necessary.

Q. And did you visit any orchards in Merced County?      A. No.

Q. Or in Stanislaus County? [86]

A. No.

Q. Have you ever in the past made examination of orchards, peach orchards, in Merced or Stanislaus Counties?      A. Yes.

Q. That is orchards suffering from a disease?

A. No, not under the situation where we made this examination.

Q. Are you familiar with the fact that some two or three years ago there was an epidemic of a disease called bacterial canker in Merced and Stanislaus Counties?      A. Yes.

Q. And did you go down and examine any of those trees?      A. No.

Q. Have you examined any orchard any place that was, in your opinion, suffering from bacterial canker?

A. Several years ago, one near Escalon.

Q. Near Escalon?      A. Yes.

Q. What type of an orchard?

A. Cling peach orchard.

Q. Will you tell us the symptoms that you observed in that orchard?

A. Branches died. There were — this has been several years, and I did not make an exhaustive



(Testimony of C. O. Hesse.)

survey in that case, but branches died, usually the young growth was blasted, that [87] is brown. Of course, they would hardly start emerging before this condition arose and generally it affected more of the tree on this particular orchard; in other words, the whole tree would generally die out. These were all young trees, because the orchard never became well established.

Q. In other words, the orchard that you did see consisted at that time of young trees?

A. Yes.

Q. Have you examined an orchard with trees approximately four years old that were suffering from bacterial canker?

A. I have seen individual trees; never orchards of trees.

Q. And did you find in those individual trees substantially the same condition that you have just described in the orchard at Escalon?

A. Well, I would say because of difference in conditions it would be hard to compare. They were not the same year. I couldn't say whether they were exactly the same conditions as the orchard at Escalon or not.

Q. Now, referring to these other two orchards that you examined last spring, do you know what had been done to those orchards in the way of treatment earlier?

A. We know that both orchards we specifically observed had received oil spray.

Q. Do you know what kind of oil spray?

(Testimony of C. O. Hesse.)

A. No. [88]

Q. I don't mean manufacturer, I mean in other words——

A. No, I don't know what proprietary brand was used, or what weight.

Q. Have you ever seen a condition of this type in an orchard which had not received an oil spray?

A. No.

Q. Would the fact that adjoining the Grimm orchard—withdraw that. Doctor, will you tell me why two adjoining orchards, adjoining the Grimm orchard, having received the same spray treatment, would show none of the symptoms which you saw and which you have described?

A. Well, I would have no idea. Actually oil injury is very sporadic and peculiar in its occurrence, and without knowing a good deal more about it I couldn't express an opinion.

Q. That is true also, is it not, of the bacterial diseases?

A. Generally they can be cultured out, at least at the time we examined them, and Dr. Wilson testified he found no evidence of an organism. If he had said he found an organism I could very well change my mind, but he found none.

Q. But you recall, Doctor, don't you, that Dr. Wilson didn't know how long the limbs had been dead that he examined?

A. In view of the other testimony, and knowing something of his work, I assume it got to him in

(Testimony of C. O. Hesse.)

reasonably good [89] condition or he would not have made the examination.

Q. Doctor, you found brown areas in the cambium area of the limbs?      A. Yes.

Q. And that is entirely consistent with a disease known as bacterial canker, is it not?

A. I can't say yes or no to that. I doubt that the occurrence of the brown area directly under the lenticel would be completely in accord with bacterial canker.

Q. Now, you just heard Dr. Wilson testify that the bacteria gets into the tree and affects it wherever there is an opening and wherever it can get in, didn't you?      A. That is right.

Q. And the lenticel opening that you are talking about is an opening through the bark of the tree?

A. Yes, but, but I stated he found no organism.

Q. It is a fact, then, that that is a method by which the bacteria of these various diseases can get into the tree and affect it?      A. Yes.

Q. The same as the way you say a spray could get in, or an oil, is that true?      A. Yes.

Q. Now, had you found around those brown openings, these brown areas of the lenticel a sour odor, smell, would [90] that have indicated anything to you?

A. Not at that time. The limbs had been damaged for some time, by that I mean certainly a week or ten days before we got there, and had been sitting there in the warm weather so at the time we

(Testimony of C. O. Hesse.)

inspected them I don't think we would have put a great deal of reliance upon any odor.

Q. In other words, what you mean then is that the absence of the odor didn't mean too much to you, did it?

A. I don't recall they had any particular peculiar odor, but I do mean if there had been an odor I would not have put much reliance on it as a diagnostic characteristic after that much time.

Q. Had you known or had you examined the trees immediately after they became sick and found a sour odor in the discolored cambium layer, would that have meant anything to you?

A. Well, I am much in the position of Dr. Hench. I would have taken samples and sent them to a qualified pathologist.

Q. In other words, do I understand you to say that you do not consider yourself qualified to express an opinion as to whether those trees were diseased or not?      A. That is right.

Q. Now, in the reading that you have done about this disease known as bacterial canker, it is true, is it not, [91] that it is frequently more widespread on the south side or the sunny side of the tree?

A. Dr. Wilson so testified, and I would certainly support his views, or accept them.

Q. All right. Then you testified to that temperatures—extremely high temperatures would affect a foliage spray, and you expressed the line as being—I don't mean to misinterpret you—as being roughly 85 degrees. Do I understand by that you do not be-

(Testimony of C. O. Hesse.)

lieve that heat would be a factor at a temperature below 85?

A. You understand the work I refer to is more in the nature of foliage spray. These definitely were not, and of course you would have to consider the heat at the point of application, or at the point where the injury occurs. That may not be the same as the ambient temperature outside.

Q. What you are referring to then is your experience with oils that are used as foliage spray?

A. Yes.

Q. To be sprayed directly on the foliage?

A. On leaves.

Q. On bushes, trees and plants?      A. Yes.

Q. And you consider that with a temperature higher than 85 that should not be done?

A. I think it would be getting into the zone of danger. [92] None of these things are as sharp as one or two degrees; other factors affect as well.

Q. And would it be your opinion it would be safe at a temperature of around 70 degrees?

A. Normally one would consider that safe.

Mr. Barnard: I have no further questions.

### Redirect Examination

Q. (By Mr. Hamilton): Dr. Hesse, as a plant breeder, will certain varieties of the same kind of fruit—now I am referring specifically to peaches—will certain varieties be more susceptible to a particular type of injury than other varieties?

(Testimony of C. O. Hesse.)

A. That is generally true no matter what the factor may be.

Q. Then I take it you would say that certain varieties of peach trees would be more susceptible to oil injury than other varieties?

A. I would expect that, yes.

Q. Let's back it down a little further, sir. Would individual trees of the same variety show more resistance to oil injury than other trees of the same variety?

A. Not in the same sense as the first question was posed. I think the second question would relate to the vigor and health and general—well, the best expression is general vigor of the tree. [93]

Q. Then given a difference in health and vigor, one would find a difference in resistance between trees of the same variety?

A. That would be possible, yes.

Q. I recognize that it would probably be unusual if you could answer this particular question, but do you have any information concerning whether or not the Merrill Gem peach tree might or might not be more susceptible to oil injury than some other varieties of peaches?

A. No, I would have no such information.

Q. You have no information on that?

A. No.

Mr. Hamilton: I have no further questions.

The Court: Will Dr. Hesse be needed further?

Mr. Barnard: I would like to ask just two questions.



(Testimony of C. O. Hesse.)

Recross Examination

Q. (By Mr. Barnard): Dr. Hesse, it is true also, is it not, that between various varieties of peach trees there is a greater or a lesser susceptibility to disease?      A. Yes.

Q. And the same thing would apply in an orchard of the same variety, that a stronger tree will resist disease more than a weaker tree in the same orchard?

A. Sometimes vice versa, but there are differences due [94] to vigor.

Q. In other words, there are differences between trees of the same variety. I had it backwards, is that correct?

A. Well, there are conditions where the vigorous tree may prove more susceptible than a less vigorous one, and with other conditions the reverse may take effect.

Mr. Barnard: That is all.

The Court: Dr. Hesse, then, as far as the Court is concerned you are excused from further attendance.

The Witness: Thank you.

(Witness excused.)

The Court: Next witness.

Mr. Hamilton: We have the deposition which we might read into the record, your Honor. May we read it at this time?

The Court: You prefer to do that than to put on a live witness at the present time?

Mr. Hamilton: I would, yes, your Honor. I think

in the progression this is the one that should go next into the record.

The Court: All right.

Mr. Hamilton: I believe the original of the deposition is on file with the Court, the deposition of Everill Kirk Harper.

The Court: Mr. Barnard, will you assist Mr. Hamilton?

A deposition is the testimony of a witness, ladies and [95] gentlemen, taken out of the presence of the Court. The witness is put under oath, and the lawyers appear, and examine the witness as though he were in court, and that has been done in connection with this witness. One of the attorneys will read the questions that were propounded to that witness at the taking of the deposition, and the other lawyer will read the answers. All right.

Mr. Hamilton: Counsel, passing over the preliminary, the stipulations at the opening, may we commence with the direct examination on page 3, at line 3:

“Q. Would you state your name, please?”

“A. My name is Everill Kirk Harper.”

(The deposition was read into the record, Mr. Hamilton reading the questions, and Mr. Barnard the answers, of the direct examination.)

The Court: I think, Mr. Hamilton, we will have to conclude the reading of this in the morning. We will take our night recess at this time and we will reconvene court at 9:30 in the morning.

(Admonition to jury, and recess until 9:30 a.m., on April 9, 1958.) [96]

Wednesday, April 9, 1958, 9:30 a.m.

The Court: Do counsel note the presence of the jury?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: So stipulated, your Honor.

The Court: Do you wish to continue the reading of the deposition?

Mr. Barnard: Yes. If the Court please, we had completed the direct examination of Mr. Harper, so Mr. Hamilton and I will trade places for the cross examination.

The Court: Very well.

Mr. Barnard: Perhaps I should state for the record I am continuing reading the deposition of Everill Kirk Harper, the cross examination.

(The reading of the deposition was continued, with Mr. Barnard reading the questions, and Mr. Hamilton the answers, of the cross examination.)

Mr. Hamilton: There is redirect examination. We might just as well continue as we are, counsel.

Mr. Barnard: For the purpose of the record, I will state this is redirect examination.

(The balance of the deposition was read.)

Mr. Hamilton: I will call C. G. Weigle.

## C. G. WEIGLE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: C. G. Weigle.

The Clerk: Have that seat.

## Direct Examination

Q. (By Mr. Hamilton): You are Dr. C. G. Weigle? A. That is my name, yes.

Q. Where do you reside, Dr. Weigle?

A. At 3429 Humboldt Way, Sacramento.

Q. And what is your business or occupation, sir?

A. I am an associate plant pathologist with the Bureau of Plant Pathology, State Department of Agriculture.

Q. The Farm Commissioners offices are a part of the State Department of Agriculture setup, are they not?

A. No, sir, they are independent departments of agriculture in each county, but they are coordinated and the work is cooperative with the State Department of Agriculture. The State Department of Agriculture acts in an advisory capacity to the county agricultural commissioners offices.

Q. Then such a person in the position of Kirk Harper, [100] whose deposition was just read, a deputy agricultural commissioner, would go to the State Department of Agriculture for further advice, is that correct?

A. That is correct, sir.

Q. How long have you been an associate plant

(Testimony of C. G. Weigle.)

pathologist with the State Department of Agriculture?

A. Since June of 1948, in my present capacity.

Q. Approximately ten years?      A. Yes.

Q. And prior to that what did you do, Dr. Weigle?

A. Prior to that I had—prior to military service which began in 1942, I spent ten years, five years of which were as a graduate student at the University of California, two years in the department of entomology, two years in the department of plant pathology, and during those ten years I also spent between three and four years with the United States Department of Agriculture, working in the field on surveys for peach diseases in California.

Q. You spent a period of four years with the United States Department of Agriculture—

A. Yes.

Q. —specializing in diseases of peaches in California, is that correct?

A. The time more accurately is three and a half years, and the work was entirely on peach orchard inspection. [101]

Q. Dr. Weigle, where did you take your initial college work?

A. My undergraduate work was in bacteriology at Stanford University.

Q. And then from there you went to the University of California?      A. That is correct, yes.

Q. And I believe you said you spent two years

(Testimony of C. G. Weigle.)

in entomology as a graduate student, and three years in pathology?

A. That is right, with the Department of Agriculture work interspersed between the two of those sessions.

Q. And there was a period of time when you were in the service?      A. That is right.

Q. Dr. Weigle, in the spring of 1957 did you have an occasion to visit the Charles Grimm peach orchard south of Bakersfield?      A. Yes, I did.

Q. Do you recall the date?

A. April 15, 1957.

Q. What happened that caused you to go to the Grimm ranch on that date?

A. I might enlarge a little bit here because of the reason—to explain my reason for having received material. My work is the operation of a diagnostic laboratory for [102] plant pathology. We receive specimens from various areas in the State, and most of them come through the county agricultural commissioners offices. The specimens are sent to us for determination as to the cause of disease or injury that they find. On April 11th we received a specimen of peach twigs and sections of small branches from the Agricultural Commissioner, Mr. Morley. At that time we did not know the property from which these twigs had originated, but Mr. Morley's request was for us to determine whether there was verticular disease or oil spray injury present. We examined the material for—

Mr. Barnard: If the Court please, I am going to



(Testimony of C. G. Weigle.)

object to the doctor testifying to results of his examination until the properties have been identified.

Mr. Hamilton: I think the objection is well taken.

The Court: All right, I——

The Witness: Its condition——

The Court: I will sustain the objection on the ground no proper foundation has been laid.

Q. (By Mr. Hamilton): Dr. Weigle, don't give us the results of your examination of the material that you received. We have it in the record that you did receive certain material from Mr. Morley, with a request that you make an examination of it.

A. That is right, yes. [103]

Q. Following that examination what did you do?

A. Following that examination, either the following day or the second day, we received a phone call from Mr. Grimm, who explained that——

Mr. Barnard: If the Court please, I will have to object to the telephone conversation.

The Court: I think that is as far as the witness can go.

Q. (By Mr. Hamilton): Don't give the conversation, Dr. Weigle. What happened as a result of that telephone call?

A. The result of the telephone call was that I on the 15th of April flew to Bakersfield, where I was met by Mr. Stockton; I believe he is the assistant agricultural commissioner of Kern County, who took me to Mr. Grimm's property.

(Testimony of C. G. Weigle.)

Q. You have mentioned a Mr. Morley. Who was Mr. Morley?

A. Agricultural Commissioner of the County.

Q. Of Kern County? A. Yes.

Q. Now, we have you at the Grimm ranch on April 15th, in the company of Mr. Stockton. What did you do there?

A. I met Mr. Grimm and Mr. Grimm's man, I believe named Mr. Davidson, and we proceeded into the block of peach trees which showed apparent injury or abnormal condition. We walked through most of the block, to obtain an overall picture of the condition of the trees, and then I started [104] to examine them in the fashion that has been described before, which is customary, of cutting into the wood, peeling the bark back, and with the aid of a shovel we removed soil from the crown and upper roots of one of the trees. We actually cut into eight or ten of the trees as far as the upper portions were concerned; we cut into the trunks rather deeply with an axe on two of the trees. My efforts were attempting to determine the extent of the internal symptoms and the disposition on the trees.

Q. And what abnormality did you find in your examination?

A. I found a dying bark of the twigs of the tree, the scorching of the leaves, the killing of the bark, and cambium, with the discoloration that has been described. I found that there was no evidence of abnormality in the larger roots or in the crown or in the trunks probably half way between the

(Testimony of C. G. Weigle.)

ground level and where the scaffold branches come out. I found that many of the large scaffolds and the larger branches were entirely girdled, causing the remaining leaves on the tips to die back and wilt. I was impressed with the confinement to a very large degree, almost entirely, to the southern half of the trees.

Q. You stated, Dr. Weigle, that occasionally, or on several occasions you found, I believe you said, primary scaffolds that were completely girdled. Completely girdled with what? [105]

A. With the killing of the bark and the cambium.

Q. You identified that killing with the browning or discoloration, brownish discoloration of the cambium, is that correct?

A. That is correct. Usually killed wood turns brown rather quickly.

Q. At the time that you were there, Dr. Weigle, did Mr. Grimm inform you of his spray program?

A. Yes, he did.

Q. Do you recall what he told you he had used?

A. As I recall, it was Ortho-K medium flowable oil, four per cent, four per cent lead arsenate, and two per cent Mitox.

Q. Now, I take it, to explain that more fully, a four per cent oil means four gallons of oil to 100 gallons of water, is that correct?

A. That is my opinion.

Q. And four per cent lead arsenate means four

(Testimony of C. G. Weigle.)

pounds of basic lead arsenate per 100 gallons of water?

A. In the same 100 gallons of water.

Q. And two per cent Mitox means two pounds of Mitox to 100 gallons of water, all in the same mixture, oil, lead arsenate and Mitox in the same 100 gallons of water?

A. I believe that is correct.

Q. At the time that you were there on April 15th, Dr. [106] Weigle, did you gather any material for the purpose of further analysis?

A. I did, yes.

Q. And how did you select the material that you gathered?

A. I selected material, as is our custom when we are trying to isolate an organism, from not the entire dead portion, but made an effort to select portions of wood containing the margin between the dead or dying portions and the live portions. I selected several sections of branches up to two inches in diameter, and a larger number of smaller pieces, smaller diameter wood perhaps from a quarter to one inch in diameter.

Q. What did you do with this material?

A. Placed them in a plastic bag, took them back to the airport with me when I returned to Sacramento.

Q. You took them to Sacramento with you?

A. Yes.

Q. Did you perform any cultures or laboratory work with this material?

(Testimony of C. G. Weigle.)

A. We examined them grossly first, and then made laboratory cultures to determine whether or not we could isolate any pathogenic organism.

Q. By a gross examination, what do you mean, sir?

A. Gross means observing the color of the outer bark, the absence or presence of exudation, the color and texture of the tissue when it is cut, and the absence or presence [107] of what we call fungus fruiting bodies, the four forming phases of fungi that produce disease.

Q. These matters that you have discussed are things that can be seen with the naked eye, or with a microscopic examination? Is that correct?

A. One or the other, yes.

Q. Now by the term producing cultures, what do you mean, sir?

A. We determine that portion of the plant material where we suspect any organism might be embedded; we remove the outer covering from that material; we sterilize the surface with a weak sterilant, one that sterilizes any contaminating organism on the surface but will not penetrate to destroy anything in the material, and then portions of it are placed on nutrient media which are suitable to the growth of bacteria and fungi.

Q. Now, you spoke of making a culture for the purpose of ascertaining whether any pathogenic disease was present. Am I correct in my understanding that by the use of the term pathogenic dis-

(Testimony of C. G. Weigle.)

ease you mean a disease that would be caused by a bacteria or a virus or a fungus?

A. Two of those are correct, bacteria and fungi we can culture in the laboratory. A virus cannot be cultured in the laboratory.

Q. Had there been a bacteria present, would your [108] culture have disclosed it?

A. It is seldom, if ever, early in the spring that we do not isolate bacteria that cause disease in peaches. If it had been later in the summer our chances would have been less.

Q. But this was early in the spring?

A. When the trees are actively growing we almost always are able to obtain the causing organism.

Q. From your physical and personal examination of the Grimm Merrill Gem peach orchard, then your laboratory analysis of the material that you gathered there, can you say, Dr. Weigle, with reasonable pathogenic certainty that no pathogenic disease was present in that orchard?

A. Judging from the symptoms that I saw in the orchard and the fact that we were not able to obtain any bacteria, pathogenic bacteria or fungi from the material cultured, I felt definitely certain that it was not a pathogenic disease.

Q. Doctor Weigle, in your laboratory work in Sacramento, how many specimens do you handle for diagnosis, let's say, in a period of a year?

A. Last year I examined—I would have to check our annual report to be specific, but I think it was



(Testimony of C. G. Weigle.)

close to 3,500 specimens of all types, but I do recall, because I was afraid I would be asked this question, that 1050 of those [109] specimens were fruits, nuts and grapes, of which I could estimate at least half are peaches, nectarines and almonds. That would make close to 500 during the past year.

Q. My mental gymnastics say that would be approximately 525 stone fruit specimens that you handled, diagnosed, coming through your laboratory in Sacramento this past year?

A. That is right.

Q. Dr. Weigle, did you observe anything in the Grimm orchard at the time that you personally visited that orchard that indicated to you some cause of the condition of the orchard?

A. The symptoms shown on the trees and the disposition of the symptoms on the trees led me to believe that a chemical injury had occurred.

Q. And knowing the spray formula that was used, sir, is there any part of that spray formula that could have caused the symptoms that you observed?

A. By a matter of elimination my opinion was that oil had caused the injury.

Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Dr. Weigle, you stated that by elimination you reached the conclusion that the oil had caused the injury. You mean, in other

(Testimony of C. G. Weigle.)

words, that you eliminated the other [110] chemicals present in the spray formula?

A. Primarily by elimination, I meant by the elimination of pathogenic or climatic factors. Secondly, my elimination, as far as the other ingredients, was not arrived at at that time because I do not know, nor claim to be an expert on sprays or spray residues or spray effects. After my return to Sacramento, I discussed with the people who do deal with such things whether or not they felt the mixture was compatible.

Q. Do you mean, Dr. Weigle, that the opinion you have just expressed is not your opinion but is an opinion that someone else gave you from what they knew about oils and sprays?

A. The opinion of the use of the word "oil" is probably from other people's information. The opinion about chemical injury is my own.

Q. However, you are the expert in determining that there was no pathological symptom there, the rest of it you have adopted what someone else told you, is that true?

A. Yes, and combined with the fact that I have seen not a large number of times, but I have seen material in our laboratory which showed similar injury and also from which we could obtain no organisms, which I was told was accidental application of excess oil.

Q. Have you ever seen oil injury in an orchard?

A. Not in an orchard, no.

(Testimony of C. G. Weigle.)

Q. In other words, your experience was solely in the laboratory?      A. That is right.

Q. Is that correct?      A. Yes.

Q. So that you are not in a position to say that the condition of Mr. Grimm's trees as you saw them in April of 1957 was typical of the condition of trees which had received an oil burn, are you?

A. No, I couldn't say. In fact, if I had not known oil had been applied, I would not have used the word "oil".

Q. And as a matter of fact, your entire opinion is a negative one, isn't it, Doctor? You couldn't find bacteria so you decided it must be oil, because that is the only thing you knew about?

A. I knew it was not a disease, and my opinion was strong enough that I felt it was definitely not a disease. I knew that oil could produce injury because I had seen material which I was told was caused by oil injury. So that resulted in the opinion.

Q. Having decided that it could not be a disease, you would then guess that it was oil.

A. That is why I used the words by elimination. The only other factor in the problem that I could form an opinion [112] on as a contributing factor.

Q. Now, when you examined Mr. Grimm's orchard, and when you cut into the cambium layer of trees and branches, did the cambium layer appear to be darker than usual?

A. Yes, it was definitely darker.

Q. Did it exude a sour smell?

A. No, it did not.

(Testimony of C. G. Weigle.)

Q. It did not, no place? A. No.

Q. And was there a running of the sap or juice of the tree from these dark places on the limbs, branches? A. I observed no exudation.

Q. You didn't. Now, tell me, Doctor, had you observed those things, had the sour smell been present and had the running of the juices or gums been present, would that have caused you to feel that it might be a bacterial disease of some sort?

A. There are two diseases of which I know that will cause killing of the cambium and the bark and there is an exudate, one is bacterial canker, and the other is a fungus disease called phytophthora. That is a water mold fungus which most commonly attacks the crown of the tree. It has been seen to hit the tops of the trees and to kill even the larger branches. So had I seen an exudate and killing, I would have thought of both of those diseases——

Q. But as you—I beg your pardon.

A. I was going to complete about the odor. The sour sap odor, which is so commonly used, is a secondary type of breakdown. Bacterial canker or phytophthora canker, both in themselves do not at first produce a sour odor. It is fermentation that occurs after the wood has been killed or injured.

Q. And does that sour odor disappear after a period of time after the limb has been dead?

A. Not until it dries, I would say.

Q. And the limbs and branches that you tested were not dry?

(Testimony of C. G. Weigle.)

A. They were not dry; they were on the tree, still moist.

Q. So that in testing the limbs that were not dry you found no sour odor, no running of gum, although you did find a darkening of the cambium?

A. Yes.

Q. Now, in your laboratory, Doctor, did you run these tests yourself, or did someone else in the laboratory run them?      A. I ran them myself.

Q. You did. And you also made the cultures in an effort to discover bacteria?      A. Yes.

Q. Would those tests also disclose a fungus?

A. Yes, they would.

Q. And would they also disclose a virus?

A. No, they would not.

Q. They would not. Did you run any test to see whether or not a virus was present?

A. No, we did not, because we know of no virus disease that produces the symptoms we saw, and diagnosis of a virus disease requires as long as a year, using tests on guinea pig trees.

Q. Did you run any tests at all to determine whether or not the samples which you had taken had been affected, or the condition had been caused by oil?      A. We know of no suitable test.

Q. So the answer is no, you did not?

A. No. We tried—I will say this: there has been a technique described where sections of wood containing oil can be stained with an oil soluble dye. We tried that with no result, but later we tried experimentally where we knew we had plenty of oil

(Testimony of C. G. Weigle.)

and it was still unsuccessful, so we say there is still no practical means of determining that.

Q. All right. Then, to summarize, Doctor, it is fair to say, is it not, that from your tests you reached the conclusion, or you were unable to find any evidence of the presence of bacteria?

A. Yes. [115]

Q. And that is as far as you went?

A. In the laboratory.

Q. In the laboratory. You made no other or further tests and you admittedly have had no experience with oil injury or oil burn, is that correct?

A. Other than the material that had been brought in to me in the laboratory.

Q. Yes. And so the opinion which you expressed in answer to Mr. Hamilton's question you have already told me was an opinion which was, except for your laboratory test, made up of what other people told you in discussing it with them?

A. As far as the cause of the injury.

Q. That is right. As far as the cause.

A. Yes. But to return to the negative aspect, I have never seen a disease that would produce the condition of the trees that I saw in the field.

Q. Did you go down to Stanislaus County a few years ago when they had an epidemic of bacterial canker?

A. Yes, I did. At that time we called it bacterial blast.

Q. Regardless of what you called it, did you



(Testimony of C. G. Weigle.)

go down when they had an epidemic of some disease in peaches, a year or so ago?

A. Not in peaches; I saw it on the almonds.

Q. Did you go down to, I believe it was in Merced County? [116] I may be wrong in my county. Did you go down to Merced County, near Atwater, two or three years ago, when they had an epidemic of some disease in peach trees?

A. No, I did not.

Q. You did not? A. No.

Q. Have you visited any orchard in the San Joaquin Valley in the last couple of years that was suffering from bacterial canker?

A. Not the San Joaquin. I have been to several in the Sacramento Valley, Butte, Sutter, Yuba Counties.

Q. And what conditions did you find there, that is condition of the trees?

A. The trees showed a bud and twig killing, with some extension of the dead bark down into the twigs, but in no case did I see any extension into the large scaffolds. It can happen, but I did not see it.

Q. In other words, it is just a question of difference in degree?

A. I saw the characteristic exudate from the trees, and I collected specimens which I brought back to the laboratory and cultured because of the bacterial problem.

Q. Can you tell us what was different about the Grimm orchard as you observed it than the or-

(Testimony of C. G. Weigle.)

chards which you observed in the Sacramento Valley, which you have now [117] determined to have been suffering from bacterial canker?

A. The trees in the field in the Sacramento Valley had dead and dying wood distributed fairly evenly over their area. There were none that I saw where the injury extended into the very large wood or into the trunk. There was some exudation. There was no appreciable odor.

Q. In either case?

A. I am talking of the Sacramento Valley now.

Q. Yes.

A. On the Grimm property the injury was by far predominantly on the south and southwest part of the trees. It was evident more on the large wood than on the one year old growth, and it extended in at least the two cases we cut with an axe half way down the trunk to the ground level. There was no appreciable gummy exudation, none to be significant as a symptom. Also there was no odor in the Grimm orchard.

Q. Is that all?

A. That is the two comparisons.

Q. Now, as a matter of fact, you know, don't you, Doctor, that in the San Joaquin Valley in particular bacterial canker usually is more prevalent on the south side of the tree, in other words, the sunny side in the spring?

A. I have never seen that situation. It may occur.

Mr. Barnard: I think that is all, Doctor. [118]

(Testimony of C. G. Weigle.)

Redirect Examination

Q. (By Mr. Hamilton): To clear this matter up, Dr. Weigle, you stated that it was your opinion that the cause of the condition of the Grimm Merrill Gem orchard was spray damage. Now, that was your opinion, was it not?

Mr. Barnard: If the Court please, I am going to object to this witness expressing any further opinion, since from his own testimony the opinion which he has already expressed is based on other person's knowledge. Now, I did not move to strike it because——

Mr. Hamilton: I want to clear it up.

Mr. Barnard: ——I wanted him to express it, but I don't think he is qualified to express further opinion on the question of oil.

The Court: Well, it was my understanding of the witness' testimony that from his examination and his general knowledge and laboratory tests and cultures, he expressed a definite opinion that the damage in the Grimm orchard was not a pathogenic disease. Is that the correct word?

The Witness: That is correct, pathogenic.

The Court: That he expressed the further statement that he had had no experience with oil sprays, that the statement he made concerning oil spray, as I understood him, was based upon his discussions and talks with others in the department [119] who were considered proficient or expert in that field. Now, that is my understanding of his testimony. Am I right or wrong?

(Testimony of C. G. Weigle.)

The Witness: I believe that is correct, sir.

Mr. Hamilton: I think that clears the matter up. My question was in reference to spray damage, not oil damage. I was under the impression the witness stated his opinion was spray damage. The particular part of the opinion came from conversations with others in the department. I think it is cleared up. Thank you.

The Court: We will take our morning recess at this time. Members of the jury, bear in mind the admonition I have given you, and we will have a short recess.

(Short recess.)

(Stipulated jury present.)

The Court: Do you have any further questions of Dr. Weigle?

Mr. Hamilton: I have nothing further.

Mr. Barnard: During the recess a matter was called to my attention. I would like to ask him a couple of questions.

#### Cross Examination—(Continued)

Q. (By Mr. Barnard): Dr. Weigle, previously I believe you stated that one of the factors which caused you to feel the Grimm orchard was not suffering from bacterial canker was that bacterial [120] canker occurred in the small limbs and not in the trunks the large limbs of the trees, is that correct?

A. Bacterial canker, I believe, is more likely to start in the young growth and work down into the

(Testimony of C. G. Weigle.)

larger limbs in those cases where it gets into the larger limbs.

Q. Doctor, are you acquainted with Dr. E. E. Wilson?  
A. I know Dr. Wilson, yes.

Q. Were you here yesterday when he testified?

A. I was.

Q. And you know that Dr. Wilson is a professor of plant pathology, University of California at Davis?  
A. Yes.

Q. Are you acquainted with an article which he wrote in a book entitled *Plant Diseases, The Yearbook of Agriculture 1953*, published by the United States Department of Agriculture?

A. Yes, I believe that is a summary of a group of papers that he wrote in the '30s on the disease.

Q. And are you acquainted with the article appearing on page 722 of that book entitled "Bacterial Canker of Stone Fruits"?

A. I would—I wouldn't know what page it was, but I know he has an article in there on bacterial canker.

Q. And may I call your attention to the fact that in that article there is just one paragraph I want to read. Dr. Wilson states: [121]

"The disease affects many parts of the tree, but the most common and most destructive phase is that on the trunks, limbs, and branches. There the pathogen enters the bark and makes circular to elongated, brown, water-soaked or gum-soaked lesions in the bark and outermost sapwood. Branches

(Testimony of C. G. Weigle.)

girdled by the canker may fail to grow in the spring. If they produce leaves and grow for a period, they die the first warm days of summer. The affected bark tissue is grown, gum-impregnated or water-soaked, and sour smelling."

Now, Doctor, in your opinion is that a correct description of the disease of bacterial canker, or is it wrong?

A. I will return to my use of the word "blast." Blast is that phase of the disease which we see in the spring where the organism has entered the blossoms or the young leaf buds as they open. The blossoms of course are only on the first year wood on peach trees, they do not occur on the older wood. The blast phase is sporadic in its occurrence, as far as being severe enough to cause economic loss. The year you mentioned, about three years ago, in the upper San Joaquin Valley, where the blast situation was so severe, was one of those years where almost all the blossoms became infected. In the average year, most years, there is a small amount of blast which occurs but not of economic [122] significance, and the disease does not progress much beyond the buds themselves or a few small twigs. Therefore, even though it occurs more frequently, I believe that it is more overlooked and it is the infection in the older parts of the wood that results in permanent damage to the tree. I agree with Dr. Wilson that the older wood infection is the most severe, costly form of disease.



(Testimony of C. G. Weigle.)

Q. As a matter of fact, Doctor, aren't they actually two different diseases?

A. No, they are not. They are the same organism expressing different symptoms under different climatic conditions.

Q. And you agree with Dr. Wilson that where it does occur in the trunks and in the limbs, the scaffold limbs, it is more severe than where it occurs in the blossoms and in the new growth?

A. Except in the sporadic outbreak, I agree it is most costly to the tree when it occurs in the older wood.

Q. And have you observed orchards which were suffering from bacterial canker in the trunks and in the major limbs? A. Yes, I have.

Q. And the orchards which you described when I first asked you that question, you distinguished from the Grimm orchard because it occurred in the twigs and in the blossoms. Now, confining yourself to the orchards where you saw it in [123] the trunks and in the limbs in the more severe condition, will you tell us what was the difference between those orchards and Mr. Grimm's orchard?

A. The outstanding example I recall is one during the floods of '55 where the trees had been under water, and that would explain its occurring all over the trees in those cases. Then other than the outbreak in 1955 of the blast, the disease can occur on the larger wood but it not confined to the larger limbs.

Q. Doctor, you are not answering my question.

(Testimony of C. G. Weigle.)

My question is, in the trees where you have seen it in the larger wood, in the trunks and in the scaffold branches, what was the difference to a visual observation of those trees than the trees in Mr. Grimm's orchard?

A. Oh. In addition to the large branches that were dying back, there were scattered smaller branches throughout the trees showing symptoms of disease.

The Court: To which are you referring now, the orchards that you examined previously, or the Grimm orchard when you make that statement?

The Witness: Your Honor, I am referring to the previous orchards where bacterial canker was diagnosed.

Q. (By Mr. Barnard): Now, would you mind repeating that statement?

The Court: Let's have Miss Schulke read it.

(Answer read.) [124]

Q. (By Mr. Barnard): And do I take it then that you found no smaller branches in the Grimm orchard showing symptoms of disease?

A. I found no smaller branches in the Grimm orchard showing injury on the north sides of the trees, the smaller branches on the south side of the trees were dying back apparently from injury below where the larger branches to which the twigs were attached had become girdled or severely injured.

Q. But they were dying?

A. They were dying from the girdling effect.

(Testimony of C. G. Weigle.)

Q. Were there any other differences between the orchards you have seen where the disease was occurring in the trunks and in the large branches, any other difference between those orchards and the Grimm orchard?

A. The absence of gumming in the Grimm orchard.

Q. The absence of gumming, and by that you mean——

A. Bleeding, gummy exudation from the injured wood.

Q. Any other differences?

A. The confinement of injury in the Grimm orchard to the one side of the trees in a uniform fashion.

Q. Confined to the south side?

A. South and southwest.

Q. Now, are you familiar, Doctor, referring again to the same treatise, to the same article written by Dr. Wilson, are you familiar with the fact that he states in [125] that article that the disease most frequently occurs on the south side of the trees?

A. I am not familiar with that statement, and I have not seen that condition.

Q. Did you hear him testify yesterday that it most frequently occurred on the south side of the trees?      A. I don't recall his wording, no.

Q. Is it *is* your opinion that is wrong?

A. I am in no position to quarrel with Dr.

(Testimony of C. G. Weigle.)

Wilson's observations, because he has worked for many years on the disease.

Q. And as a matter of fact, your experience has been largely confined to the laboratory?

A. Except for the four years with the United States Department of Agriculture.

Q. But you haven't made numerous trips out into the field to observe these conditions in the trees as they exist in the orchards, have you?

A. Not more than five or ten a year.

Q. Now, one other thing, Dr. Weigle, when a tree has been affected by bacterial canker and one, two or more of the scaffold limbs have died, is it a normal condition that as the growing season progresses the tree will throw out new shoots from below the point of injury?

A. Usually that occurs in trees that are quite severely [126] injured, and it occurs below attachment of the scaffold from the ground level.

Q. It does occur?           A. It does occur.

Q. It does occur in trees that have been quite severely injured?           A. Yes.

Q. And the new shoots come from below the point where the scaffold limbs were injured and died?

A. I have only seen it from the ground level, not from the scaffold itself.

Q. I misunderstood you. In other words, the new shoots come from the ground level?

A. That is right.

Q. And then do those new shoots go on and

(Testimony of C. G. Weigle.)

produce a new peach tree, in other words?

A. If they arise from the budded or upper portion of the tree. If they arise from below the portion of the line of union then they are shoots from the seedling and have no commercial value.

Q. But the reason that they arise, in other words, is that the disease bacterial canker does not affect the roots, does not affect the part of the tree below the ground? A. That is right.

Q. And the part of the tree above the ground having [127] been killed or been made at least very sick, the roots express themselves by throwing out new shoots? A. That is correct. They can.

Mr. Barnard: That is all.

The Court: Did you complete your answer?

The Witness: Yes, sir. Your Honor, I might add one statement, if I may.

The Court: Will you speak loud enough so we can all hear?

The Witness: One point I was going to make, counsel, is that that same effect can be produced mechanically, if a tree is cut with an axe or blade close to the ground it too will force suckers, which also amplifies the fact there has been no root injury in that case.

### Redirect Examination

Q. (By Mr. Hamilton): Dr. Weigle, bacterial canker is an infectious disease, is it not?

A. That is correct.

Q. In other words, it will spread from tree to tree and from limb to limb on the same tree?

(Testimony of C. G. Weigle.)

A. Yes.

Q. So far as you know, are there any varieties of peaches that are resistant to bacterial canker?

A. Not as far as I know.

Q. So far as your knowledge is concerned, all varieties [128] of commercial peaches are equally susceptible to bacterial canker?

Mr. Barnard: Now, if the Court please, I think counsel should quit leading the witness.

Mr. Hamilton: I think it is a leading question.

The Court: Do you withdraw the question, Mr. Hamilton?

Mr. Hamilton: I will withdraw the question.

Q. Are all varieties of peaches equally susceptible to bacterial canker, Dr. Weigle?

A. I couldn't name by variety any difference in susceptibility, but knowing the nature of the stone fruit trees and the diseases that affect them, I am confident that there are differences in susceptibility.

Q. Are you familiar with the Blazing Gold variety of peach?

A. I am familiar with the variety.

Q. Are you familiar with the Gold Dust variety of peach?

A. Yes, I am.

Q. And you are familiar with the Merrill Gem variety of peach?

A. Yes.

Q. Between those three varieties is one any more resistant to bacterial canker than another, so far as you know?

A. I do not know. [129]

Q. Have you ever heard of one of those tree varieties being or less susceptible to bacterial canker?



(Testimony of C. G. Weigle.)

The Court: Well, I doubt if that is a proper question. The witness says he doesn't know, and that would be based upon his training and experience and knowledge and information, so I don't think whether he has heard it or not would add anything to this.

Mr. Hamilton: Very well, your Honor.

Q. Bacterial canker has been identified as a pathogenic disease of stone fruit trees for how many years?

A. It has been known since before the turn of the century. I don't believe its actual cause was determined until late '20s or early '30s.

Q. The positive identification is in the laboratory and by the culture method, is that not correct?

A. That is confirmatory identification, although many times it is determined by our inspectors in the field on the symptoms expressed in the field.

Q. Had there been bacterial canker in the Grimm Merrill Gem orchard, would your laboratory tests have disclosed its presence?

A. At that time of year I believe it would have, yes.

Mr. Hamilton: I have nothing further.

Mr. Barnard: Just a couple of questions, Doctor. [130]

#### Recross Examination

Q. (By Mr. Barnard): You stated that from your general knowledge of stone fruit trees you were confident that some varieties would be more susceptible to bacterial canker than others. Would

(Testimony of C. G. Weigle.)

the fact that a particular variety of what we call an early variety have anything to do with that?

A. I am not sure that it would, since the disease is known to spread even in the fall, and an early variety would not exhibit too much difference at leaf fall time than the later varieties of peaches.

Q. Is there any difference in the rate of growth and so forth in the spring between the early varieties and the later varieties?

A. Yes, there is a difference.

Q. Which grows the fastest?

A. The early varieties.

Q. And it is a fact, is it not, that a tree or a plant or even a human being which is growing very rapidly, and in other words is using up all of its energy, is then susceptible to disease?

A. I believe it was pointed out yesterday that it depends upon the disease. Some diseases will attack a more rapidly growing plant more readily than a devitalized one, and the reverse is true in some cases. [131]

Q. What is your opinion insofar as bacterial canker is concerned on peach trees?

A. I believe that the disease is more dependent upon the rainfall and the temperature relationship during the winter than it is on the rapid or non-rapid growth rate in the spring.

Q. Do I take it then that it is your opinion there would be no difference in susceptibility between early peaches and late peaches?

A. I don't know of any difference.

Q. You don't have an opinion as to whether

(Testimony of C. G. Weigle.)

that would be a factor? A. Right.

Mr. Barnard: Very well. Thank you.

The Court: Will Dr. Weigle be needed further?

Mr. Hamilton: Not that I know of, your Honor.

Mr. Barnard: No, I think not, your Honor.

The Court: As far as the Court is concerned, Doctor, you are excused from further attendance.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamilton: We will call Charles Grimm.

The Court: One of the jurors has a question, Mr. Peden.

The Juror: May I ask the official capacity of the testimony of Mr. Harper?

The Court: He was a deputy agricultural commissioner, [132] wasn't he, of Bakersfield, Kern County. Does that answer your question, Mr. Peden? Am I right in that statement?

Mr. Hamilton: That is correct.

The Court: Very well.

### CHARLES WILLIAM GRIMM

the plaintiff, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Just have that seat.

#### Direct Examination

Q. (By Mr. Hamilton): You are Charles W. Grimm, are you not? A. Yes.

Q. And you are the plaintiff in this action?

A. Yes.

(Testimony of Charles William Grimm.)

Q. What is your business or occupation, Mr. Grimm?      A. I am a farmer.

Q. Are you also a fruit grower?      A. Yes.

Q. How much land do you farm?

A. 240 acres.

Q. How much land is in orchard or vineyard?

A. 120 acres in vineyard and 36 acres in orchard.

Q. And what does the vineyard consist of?

A. Thompson seedless, Cardinals and Revere grapes.

Q. And what does your orchard consist of?

A. Blazing Gold peaches, Gold Dust peaches, Merrill Gem peaches, Sunrise nectarines, and Le-Grand nectarines.

Q. Mr. Grimm, how many acres are in Merrill Gem peaches?      A. Approximately 8.2 acres.

Q. How many acres, Mr. Grimm, are in Blazing Gold peaches and Gold Dust peaches together?

A. About 11 acres.

Q. And are the three varieties of peaches all in the same orchard?

A. Yes, they are in the same orchard.

Q. Using just this diagram for a moment to show a portion, I notice here we have——

The Court: Mr. Hamilton, for the purpose of the record, I think we will have that marked Plaintiff's Exhibit No. 1 for identification.

Mr. Hamilton: Thank you, your Honor.

The Court: So if you will refer to it that way it will keep the record a little clearer.

(Testimony of Charles William Grimm.)

(The diagram referred to was marked as Plaintiff's Exhibit 1, for identification.)

Q. (By Mr. Hamilton): Referring to the diagram marked for identification as Plaintiff's Exhibit 1, I notice on the left hand side you have "row number". Your Blazing Gold and Gold Dust varieties of peaches, are they adjacent to row 1 or row 11? [134] A. Row number 11.

Q. In other words, if this diagram were extended upward beyond row 11, the next row would be what variety?

A. The row on the end that you are referring to would be Gold Dust variety.

Q. Does the Gold Dust variety run clear through the full length of the Merrill Gem?

A. No, it does not; it runs half way through.

Q. And does the Blazing Gold variety compose the other half of that next row?

A. That is correct.

Q. Is there any difference in the distance between each of the rows and the distances between the last row of Merrill Gems and the first row of Gold Dust or Blazing Gold?

A. There is no difference.

The Court: Mr. Hamilton, does each cross—and I assume it is a cross—represent a tree?

Mr. Hamilton: We may as well go into the diagram at the present time, your Honor.

Q. Mr. Grimm, for the purposes of use in this action, you made a tree by tree and row by row examination of your orchard, did you not?

A. Yes, I did.

(Testimony of Charles William Grimm.)

Q. And did you on a piece of paper smaller than this but of similar design make a mark depicting each tree? [135]      A. Yes, I did.

Q. This particular diagram that has been marked for identification as the Plaintiff's Exhibit 1, is a blown up or an enlarged reproduction of the smaller document that you made, is that correct?      A. That is correct.

Q. Now, to identify each of the characters on this diagram, row number one is on which side, directionwise, of your Merrill Gem orchard?

A. On the extreme south side.

Q. The point where the word "row" with a figure after it representing the row number is placed on the diagram, that then would be the westerly edge or end of your Merrill Gems?

A. That is correct.

Mr. Barnard: Excuse me, Mr. Hamilton. For the record, the word "row" appears on both ends.

Mr. Hamilton: I didn't notice that.

Mr. Barnard: Could we say that to the left of the diagram would be west, and to the right would be east?

Mr. Hamilton: That would be correct directionwise.

The Witness: That would be correct.

Q. (By Mr. Hamilton): Now, confining your attention to a number of characters following the words "row No. 1" as it appears on the left hand side of the diagram, the westerly edge [136] of the orchard, I notice a series of Xs. Do each one of those Xs represent a tree?      A. Yes.



(Testimony of Charles William Grimm.)

Q. What kind—I don't mean varietywise because all the trees depicted on this diagram are Merrill Gems, is that correct?

A. That is correct.

Q. What condition is the tree represented by the letter X as it exists now?

A. This survey was made shortly after we sawed out the dead wood in the orchard, and the Xs indicates trees where no primary limbs were sawed out.

Q. Now when did you saw out the dead limbs?

A. In October.

Q. Of 1957? A. '57.

Q. And this survey was made immediately after that? A. That is correct.

Q. Then the letter X, wherever the letter X appears on this diagram, represents a tree that is in normal condition, or a tree that no major or primary limbs were cut off, is that correct?

A. That is correct.

Q. The next change in character as appears on the diagram is the letter one. Does that letter one also represent a tree? [137] A. That does.

Q. And what is the difference between the tree depicted by the letter one and the tree depicted by the letter X?

A. The letter one was indicated where one primary or major limb was cut off the tree.

Q. Then at this particular tree, and I am pointing to a figure one, that means that on that particular tree a major limb had been cut off?

A. That is correct.

Q. As we go on down this row number one, the

(Testimony of Charles William Grimm.)

next change in character is the figure two. Does that figure two also represent a tree?

A. That represents a tree and it also represents where two major limbs have been cut off.

Q. The next change of character as appears on the diagram, and going up the consecutive numbered rows, appears in row number four, and there appears on there the figure three. Does that figure three represent a tree?

A. That also represents a tree, and it also represents where three major limbs were sawed off.

Q. As we go on easterly, or to the right in row number four, I notice in various places the letter S. What does that letter S represent?

A. That represents a stump, or where we had to saw the tree down to the ground, or all the major scaffolds sawed off. [138]

The Court: Mr. Grimm, you are inclined to let your voice drop near the end of each sentence, and it might be difficult for all to hear. So bear it in mind, as it is important that everyone in the court room hear everything you say.

The Witness: I will try.

Q. (By Mr. Hamilton): Now, at the base of the diagram appear certain letters and figures with a row designation above, and under row number one, on the same diagram, is the letter 62-X. What does that mean?

A. That in row 2——

Q. No, we are referring to row 1, 62-X.

A. Well, you know, that is just a little far for me to read from here.

Q. You may step down.

(Testimony of Charles William Grimm.)

The Court: You may step down, but when you get down there, why, face the jury and the reporter, so we can hear what is said.

Q. (By Mr. Hamilton): Could you stand here, Mr. Grimm, and see the diagram.

A. Row 1 indicates there——

Q. I am referring to the 62-X.

A. There are 62 trees that no limbs were cut off, no primary limbs. [139]

Q. Just below 62-X appears the figure 2-1.

A. That indicates there were two trees where one limb was cut off.

Q. That is in this particular row number one?

A. Yes.

Q. And the last figure in the column is 2-2.

A. That indicates that there are two trees where two primary limbs were sawed off.

Q. And all of those are in this particular row?

A. That is correct.

Q. And each of the figures under the row designation at the bottom of this diagram indicate the same things? A. Same thing.

Q. If it is a 7-S that means under row number 4 that means in row 4 there were seven trees in which all of the primaries were cut off?

A. That is correct.

Q. 9-3 means that in row 4 nine trees had three of the primaries cut off?

A. That is correct.

Q. You may return to the witness stand, Mr. Grimm. No where on the diagram does there appear the total; in other words, the collective total-

(Testimony of Charles William Grimm.)

ing of all of the trees in the orchard. How many trees are there in this orchard, Mr. Grimm?

A. There are 726. [140]

Q. How many were cut back to the stump, that is with all of the primaries cut off?

A. There were 22.

Q. Isn't it a fact that one tree was killed entirely? A. That is correct.

Q. Now, is that one tree that was killed entirely part of the 22? A. That is correct.

Q. How many trees had three limbs, three primaries cut off? A. There were 58.

Q. How many trees had two major limbs cut off? A. 93.

Q. And how many trees had one major limb cut off? A. 128.

Q. And the balance of the trees in the orchard, the remaining part of the 726, had no major or primary limbs removed? A. That is correct.

Q. That was at the time of this pruning or cutting away of dead wood in October of 1957?

A. That was shortly after we did the sawing off of these limbs, prior to pruning.

Q. Mr. Grimm, in your orchard how many major limbs does the average tree have? [141]

A. I believe about five.

Q. Mr. Grimm, in the spring, early spring of 1957, January or February, you purchased some material from Cal-Spray? A. Yes.

Q. For use on your peach orchard?

A. Yes.

(Testimony of Charles William Grimm.)

Q. And the conversation, or your contact with Cal-Spray was through Tim Hanna, is that not correct? A. That is correct.

Q. One of the materials purchased and delivered to you was a light medium flowable oil, is that correct?

A. No, I will have to correct you. It was a medium oil, not a light medium.

Q. It was a medium flowable oil? A. Yes.

Q. At the time of the purchase of this oil, did you and Mr. Hanna have any substantial discussion of the amount of oil that you should use?

A. Yes, we did.

Q. Would you repeat, as best you can recollect, the conversation between you and Mr. Hanna?

A. Well, prior to the purchase of the oil, we discussed the spraying of the orchard, and the formula to be used. Mr. Hanna recommended that we use a four per cent medium oil [142] with lead arsenate and Mitox. I knew nothing of the Mitox because it was a new material to me, but I objected to the use of four per cent oil, and I told him at that time that I was fearful of its use. Well, he told me that he would find out more about it, and we would discuss it later. Prior—again prior to the application we had another discussion about the same formula, and he at that time contacted his office by radio, and was informed by someone that he later told me was Mr. Fisher that the four per cent oil was safe to use.

Q. It was on that basis that you used it?

(Testimony of Charles William Grimm.)

A. That was the basis on which I used it.

Q. Mr. Grimm, what was the condition of your Merrill Gem orchard on March 4, 1957?

A. I believe it was a normal orchard. I believe it was as good as any orchard in that vicinity.

The Court: May I inquire, Mr. Grimm, were your peach orchards planted the same year?

The Witness: No, they are different ages.

The Court: Oh. Well, may I inquire as to the Gem orchard?

The Witness: The Gem orchard was planted in 1953. The other orchards, the other peach orchard was planted in 1951.

The Court: That is the Blazing Gold?

The Witness: And Gold Dust.

The Court: But were all of your Gem peaches planted the [143] same year?

The Witness: Yes, sir, the same year.

The Court: That was in 1954?

The Witness: 1953.

The Court: 1953.

Mr. Hamilton: Thank you, your Honor.

Q. On March 4, 1957, Mr. Grimm, was your Merrill Gem orchard healthy?

A. It was healthy.

Q. Was it in vigorous growing condition?

A. Well, the wood looked vigorous. There was little or no foliage at that time.

Q. Were the buds showing? A. Yes.

Q. And that is both leaf buds and blossom buds, is that correct? A. Yes.



(Testimony of Charles William Grimm.)

Q. It was then in the pink bud stage?

A. Yes, it was in the pink bud stage.

Q. When did you apply the spray?

A. On the 5th and 6th of March, 1957.

Q. Had any of the blossoms opened by the 5th and 6th of March?

A. In the Merrill Gems there were a few blossoms that had cracked, what we call popcorn stage.

Q. I couldn't hear that last.

A. Popcorn.

The Court: Popcorn stage.

A. The buds, the fruit buds were swollen and cracked to where you could see the inner blossom.

Q. (By Mr. Hamilton): In other words, you could see the flower forming but it wasn't fully opened?

A. It wasn't fully opened, and in all cases, you couldn't in all cases see the blossoms themselves.

Q. Of the three varieties, Mr. Grimm, which if any are the earliest?

A. The Blazing Gold are the earliest.

Q. Was the blossoming on the Blazing Gold further advanced than that of the Merrill Gems?

A. Yes, they were.

Q. How about the Gold Dust? Is it earlier than the Merrill Gems? A. It is also earlier.

Q. And then the blossoming on the Gold Dust was further advanced? A. Yes.

Q. The least advanced was your Merrill Gems?

A. Yes, that is correct.

Q. And now, the description of the status of

(Testimony of Charles William Grimm.)

the buds [145] that you gave previously, the buds were swollen in certain cases, they were in what you call popcorn position, that is they were opening, the flower was visible but not completely opened. Does that refer to the Merrill Gems?

A. I was referring to the Blazing Gold.

Q. What was the condition of the Merrill Gems?

A. They were in the pink bud stage.

Q. Definitely pink bud stage. After the 5th and 6th of March, 1957, did you notice anything wrong with the orchard?

A. Shortly after that I did.

Q. By shortly after that, what do you mean, a week or ten days?

A. Within a week or so, I began to notice in the Blazing Gold particularly that some of the blossoms were beginning to fall, and on examination we found the pistils on some of the blossoms were burned, drying. We watched that for a few days and it seemed to clear up, but about that time Mr. Hanna called my attention to a lone Gem tree that showed a necrotic condition, and we watched that tree for several days. He suggested that we use a foliage nutrient to see if we could not stimulate it, and he did bring me out a bag of material, and I did intend to put it on, but about that time we began to discover that we had many trees starting to show that same symptom.

Q. Of what variety? [146]

A. Particularly the Gems. We had two trees in the Gold Dust that showed that symptom. But

(Testimony of Charles William Grimm.)

we had this condition progressively, it got worse day by day, and with the result that we had a very severely damaged orchard.

Q. Now, is that statement severely damaged orchard, is that applicable to the Gold Dust and the Blazing Gold peach trees, as well as the Gems, or is that confined to the Gems?

A. It is confined to the Gems. The two trees that we found in the Gold Dust eventually righted themselves and showed no further distress.

Q. Now, you have referred to Mr. Hanna. That is the same Tim Hanna who was an *employ* of Cal-Spray? A. Yes.

Q. During this period after March 5th and 6th of 1957, was Mr. Hanna at your orchard almost daily?

A. Well, he was there quite frequently. I wouldn't say he was there almost daily, but he was there quite frequently.

Q. And did you discuss with him various possibilities concerning what might be wrong with it and the possibilities of curing it?

A. Yes, I did.

Q. What, if anything, did Mr. Hanna do in obtaining assistance to ascertain the cause of the condition of the [147] Merrill Gem orchard?

A. The only thing that I know that he did, besides discussing with me certain possibilities that we might attempt, he took some soil samples. That is about all, I believe.

Q. Isn't it correct that he contacted the higher

(Testimony of Charles William Grimm.)

officials of the company to obtain some further advice for you?

A. Well, he did and I did too, I don't know which did it first.

Q. Who did you contact in Cal-Spray besides Mr. Hanna?

A. I attempted to get ahold of Mr. Robert Blois, and he did eventually come out, within a few days I believe.

Q. Who else did you get hold of, which California Spray-Chemical Corporation employee?

A. Directly I don't believe that I attempted to get ahold of anyone besides——

Q. Did Mr. Hanna bring other employees of the company to view your orchard? A. Yes.

Q. Who did he bring?

A. He brought Mr. Fisher, Mr. Hal Fisher, and Dr. Sessions.

Q. Do you know or do you recall when it was that Mr. Fisher and Dr. Sessions came to the orchard?

A. Well, they were there on several occasions, two or three occasions at least, and I would say that some time [148] between the middle and the last of March they were present there for the first time, and then during April and even as late as May perhaps.

Q. And during the same general period the men that we have heard from the witness stand came to your orchard and made their examinations they have talked about? A. That is correct.

(Testimony of Charles William Grimm.)

Mr. Barnard: If the Court please, I don't think that that is quite correct. I think counsel should correctly state it because the witness has just testified these people were there in the middle of March, and I believe all of the witnesses placed their visits in April, so the period is just too broad.

Mr. Hamilton: I believe the witness said from the middle of March up into May.

Mr. Barnard: That is correct, but your statement that the others visited at the same time is too broad.

Mr. Hamilton: I will narrow that.

Q. From time to time, and not at the same identical times, but during the same month of April, these other gentlemen that we have heard from the witness stand made their examinations of your orchard?

A. Yes, I believe there was one time when they were there when these other gentlemen were there also.

Q. When you say "they" who do you mean?

A. Dr. Sessions and Tim Hanna, I believe that they were there on one occasion when—I don't remember whether it was one of the boys from the University was there but I can't remember which one.

Mr. Hamilton (Showing document to counsel): You have seen this?

Mr. Barnard: Yes.

Mr. Hamilton: Would you mark these for identification?

(Testimony of Charles William Grimm.)

(The documents referred to were marked as Plaintiff's Exhibits 2 and 3 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you two documents clipped together, marked for identification as Plaintiff's Exhibit 2. Would you look at those documents and tell me what they are?

A. Well, the first copy is the original and the second copy is a copy of the original for 72 four-pound bags of Ortho Mitox that was delivered to my ranch.

Q. Now, is that one of the materials used in the spray? A. Yes.

Q. And is this invoice for the material delivered to you for the purpose of using it in your spray? A. That is correct.

Mr. Hamilton: May I offer this into evidence.

The Court: Of course, there is no question, dispute between the parties that the defendant furnished the materials. [150] Is that right?

Mr. Barnard: I would think we could stipulate to that.

The Court: Well, I will have it marked in evidence as Plaintiff's Exhibit No. 1. It was my understanding there is no dispute or question between the parties on that.

(The document heretofore marked for identification as Plaintiff's Exhibit 2 was received in evidence.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you two more documents which appear to be an original and copy. Are those the invoices for the



(Testimony of Charles William Grimm.)

other materials used in the spray program on the 6th and 7th of March 1957?

A. This includes the rest of the materials delivered to my ranch for spraying.

Mr. Hamilton: And I offer this in evidence, your Honor.

The Court: That will be received and marked Plaintiff's Exhibit 3.

(The document heretofore marked for identification as Plaintiff's Exhibit 3 was received in evidence.)

The Court: May I inquire, Mr. Grimm, did you seek the advice or services of the defendant, or did some employee of the defendant come to your ranch?

The Witness: Your Honor, I have purchased materials from California Spray-Chemical Company for about ten years.

The Court: I see. [151]

The Witness: And they were frequently on my ranch, and they made recommendations to me for other pest control problems.

The Court: I think we will recess, Mr. Hamilton, for lunch.

Mr. Barnard: Pardon me, but before we do, the diagram that was marked for identification, was it ever received in evidence.

The Court: I don't think it was offered.

Mr. Hamilton: I will offer it into evidence.

The Court: The document then on the board will be marked Plaintiff's Exhibit 1 in evidence.

(Testimony of Charles William Grimm.)

(The diagram heretofore marked for identification as Plaintiff's Exhibit 1 was received in evidence.)

(Admonition to the jury, and recess at 11:58 a.m., until 2:00 p.m. of the same day.) [152]

Afternoon Session—2:00 P.M.

(Stipulated the jury was present.)

The Court: All right.

CHARLES W. GRIMM

the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Hamilton: Would you mark these for identification, the whole group together?

(The documents referred to were marked as Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, just prior to the noon recess we had entered invoices of materials delivered to you by Cal-Spray for the purpose of use as a spray material on your peach orchard. Did you use all of that material?

A. No, I did not.

Q. I show you a group of documents, Mr. Grimm, three, appearing on their face to be Cal-Spray invoices of credit given to you for material returned. Are those the invoices showing the portion of the materials reflected in the other invoices that you returned to Cal-Spray?

(Testimony of Charles William Grimm.)

A. Yes, this is the material I returned to Cal-Spray.

Q. Included in those invoices, the ones you just have, [153] these are marked for identification as Plaintiff's Exhibit 4, are other and additional materials accumulated by you from Cal-Spray for use in other purposes?

A. Yes, there is an item of standard lead arsenate and other materials that were used on sprays for grapes from the previous year.

Mr. Hamilton: I offer these in evidence, your Honor.

The Court: They will be received and marked Plaintiff's Exhibit 4.

(The documents heretofore marked for identification as Plaintiff's Exhibit 4 were received in evidence.)

Q. (By Mr. Hamilton): Mr. Grimm, what is the spacing of the trees in your peach orchard?

A. They are 20 by 24 feet.

Q. In other words, each tree occupies a 20 by 24 foot space? A. Yes.

Q. Thank you. Mr. Grimm, I note on the invoice marked as Plaintiff's Exhibit 2, which indicates on its face a sale of Ortho Mitox 40 wettable, that the invoice carries the designation that it is for experimental sale. In conversations with Cal-Spray's employees prior to your purchase and use of this material did any of them say anything to you about any [154] part of the material being for experimental purposes?

(Testimony of Charles William Grimm.)

A. No, they did not.

Q. When did you first learn that the Mitox was designated by them as for experimental purposes?

A. Not until this action was actually started.

Q. And that was long after March 5th and 6th of 1957? A. Yes.

Mr. Hamilton: Will you mark these? I think they can be marked as a group, put them together with a staple.

(The pictures referred to were marked as Plaintiff's Exhibits 5, 6, 7, 8 and 9 for identification.)

Mr. Hamilton: Counsel, I believe these pictures were shown to you.

Mr. Barnard: I will look at them again.

Q. (By Mr. Hamilton): Mr. Grimm, I show you a group of pictures that have been marked for identification as Plaintiff's Exhibits 5 through 9. Would you look at those pictures and tell me what they depict?

A. These pictures depict the condition of these trees from probably about the middle of April on until these pictures were taken sometime in perhaps July.

Q. Did you yourself take those pictures?

A. No, I did not.

Q. Who took them? [155]

A. Mr. Roundtree.

Q. Are they pictures of your Merrill Gem peach orchard? A. They are.

The Court: I didn't quite understand your state-

(Testimony of Charles William Grimm.)

ment, Mr. Grimm. The pictures were taken in July?

The Witness: I believe it was about July that they were taken.

The Court: Well, I was under the impression you stated the pictures depicted the condition of the trees from about April until July.

The Witness: Perhaps I should restate that. What I tried to say was the trees appeared to be in about this condition from April until the pictures were taken.

The Court: I see.

Mr. Hamilton: I will offer these in evidence.

The Court: They will be received. They have been marked as one exhibit?

Mr. Hamilton: No, they are marked as Plaintiff's Exhibits 5 through 9.

The Court: All right, they will be received in evidence and be marked 5 through 9 in evidence.

(The pictures heretofore marked for identification as Plaintiff's Exhibits 5, 6, 7, 8 and 9 were received in evidence.)

Mr. Hamilton: Thank you. May I show them to the jury?

The Court: Yes. Divide them up. [156]

(The exhibits were passed to the jury.)

Mr. Hamilton (After showing to counsel): Mr. Clerk, I think these could be marked as one exhibit, they can be put together with a rubber band or paper clip.

(Testimony of Charles William Grimm.)

(The documents referred to were marked as Plaintiff's Exhibit 10 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you another group of pictures that collectively have been marked for identification as Plaintiff's Exhibit 10. Would you look at those pictures and tell me what they depict?

A. Of this group there are two pictures of normal trees, that is trees that were undamaged or apparently undamaged, and the balance represent the various stages of cutting that was necessary to remove the dead portions of the limbs of the trees.

Q. Now, are those pictures of your Merrill Gem peach orchard?

A. They are all Merrill Gem peach orchard.

Q. Who took those pictures?

A. I took these myself.

Q. When were they taken?

A. These were taken, part of these pictures—this group of pictures was taken immediately at pruning time.

Q. In 1957? [157]

A. Probably December or January, 1957 or the first part of 1958. There is one picture that I attempted to show the sun burn caused from the exposure to the sun.

Mr. Hamilton: I offer these into evidence.

Mr. Barnard: Could I request that you ask Mr. Grimm to segregate the two pictures that are normal trees, and have them marked A and B?

The Court: Well, how many are there?



(Testimony of Charles William Grimm.)

Mr. Hamilton: There are two.

Mr. Barnard: There are 16 altogether.

The Court: Oh, there are 16 altogether.

Mr. Hamilton: Two show it.

The Court: You have had them all marked as one for identification?

Mr. Hamilton: They have been marked as one for identification.

The Court: We will mark the two that as I understand reflect or indicate the normal condition of the trees at the time the pictures were taken, we will mark those 10-A and 10-B. Now, it seems to me that there was another one that Mr. Grimm indicated showed——

Mr. Hamilton: He did indicate an attempt to show sun burn. Would you select that picture, Mr. Grimm.

The Court: That one will be marked 10-C. And the remaining ones, Mr. Grimm, would you just describe what they [158] show as a group?

The Witness: As a group they show the various stages of sawing that was necessary to remove the dead wood.

The Court: Well, those then will remain Plaintiff's 10 for identification.

Mr. Hamilton: I offer these in evidence and may they be accepted, 10-A, 10-B and 10-C.

Mr. Barnard: I have no objection.

The Court: All right. Does that include the remaining group?

(Testimony of Charles William Grimm.)

Mr. Hamilton: Yes, that includes the others marked for identification as Plaintiff's 10.

The Court: All right. They will be received then and marked Plaintiff's Exhibit 10 in evidence, and the ones specifically designated will be marked 10-A, 10-B and 10-C, as they have already been marked.

(The documents referred to were received as Plaintiff's Exhibit 10, and 10-A, 10-B and 10-C.)

(The exhibits were passed to the jury.)

Mr. Hamilton: I think these can all be marked as one exhibit.

(The documents referred to were marked as Plaintiff's Exhibit 11 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you another group of pictures that [159] have been marked collectively as Plaintiff's Exhibit 11. Would you look at those pictures and tell me what they depict, who took them, and the date on which they were taken?

A. I took these pictures and they depict the same situation as we have in the other group.

Q. When were they taken?

A. They were taken prior to the time of these last pictures.

Q. At approximately what date?

A. About a month later.

Q. And they are pictures of your Merrill Gem peach orchard?

A. There is one thing that I must point out.

(Testimony of Charles William Grimm.)

There may be duplications in this group and in that group. In other words, there may be the same shot of a tree in this group as in that.

Mr. Hamilton: I offer these in evidence, your Honor.

The Court: They will be received, and how are they marked?

The Clerk: There were six.

Mr. Hamilton: Marked Plaintiff's Exhibit 11.

The Court: All right, they will be received then as one exhibit.

(The pictures heretofore marked for identification as Plaintiff's Exhibit 11 were received in evidence.)

(The exhibits were passed to the jury.) [160]

Q. (By Mr. Hamilton): Mr. Grimm, after March 5th and 6th, and while the investigation of your Merrill Gem orchard was under way to ascertain if possible the cause of the condition of the orchard, did an Alwyn C. Sessions come to your orchard? A. Yes, he did.

Q. And in what capacity did he appear there?

A. He was with—he is with California Spray-Chemical and is their plant pathologist.

Q. Were you told in advance by any employee of Cal-Spray that he was coming?

A. I don't recall that I was.

Q. You met Dr. Sessions at the ranch when he arrived there, did you not? A. Yes.

Q. Do you recall having a conversation with him? A. Yes.

(Testimony of Charles William Grimm.)

Q. At the time of his arrival?

A. Yes, I do.

Q. Was that conversation at a place where you could view the Merrill Gem peach orchard?

A. Yes, we were in the Merrill Gem peach orchard.

Q. Who was present at that time besides yourself and Dr. Sessions?

A. Well, one time that I remember specifically was [161] at the same time that Dr. Hesse was there. Excuse me, I will have to correct that name.

Q. I am referring, Mr. Grimm, to your meeting Dr. Sessions. Did you have a conversation with him?

A. Well, he has been there several times. The first time that he saw the orchard he asked me if we had used any fertilizers and if we had used a herbicide or a weed oil in the orchard.

Q. What is a herbicide?

A. It is a material used to kill weeds.

Q. Now, at the time of that conversation, can you recall who else was present besides yourself and Dr. Sessions?      A. Yes,—

Q. And participated in the conversation.

A. Mr. Hanna, I believe was there.

Q. Anyone else that you recall?

A. I don't remember whether Mr. Blois was there or not.

Q. Were you in the Merrill Gem orchard at the time of that conversation?      A. Yes, we were.

Q. What was your reply?

(Testimony of Charles William Grimm.)

A. I told him that we had used neither fertilizer nor weed oil.

Q. Did you tell him what you had used?

A. Yes, he knew what we had used. [162]

Q. What was it that you told him you had used?

A. I told him that we had used the oil, Mitox and lead arsenate.

Q. Mr. Grimm, do you have any other Merrill Gem trees on your ranch besides the Merrill Gem trees that are depicted by the map, if I may call it so, marked and entered as Plaintiff's Exhibit 1?

A. Yes, I do.

Q. How far are those other Merrill Gem trees from the commercial Merrill Gem orchard?

A. I would estimate about 300 feet.

Q. In other words, about 100 yards?

A. Yes.

Q. And am I correct that they lie just easterly of the easterly end of the Merrill Gem orchard, about 100 yards space between?

A. Yes, they do.

Q. How many of those are there?

A. There are about 18 now.

Q. And how does it happen that you had those?

A. They were in the original shipment when I planted this orchard, and we set them around a reservoir for one year. I thought at that time that would be the place to put them. I later decided they were in the way and I transplanted them into the row they are now in. [163]

Q. Now, those trees are located near and be-

(Testimony of Charles William Grimm.)

hind the ranch house located on your ranch?

A. Yes.

Q. And is there a sort of family orchard located in that area? A. Yes, there is.

Q. And these Merrill Gems are part of that family orchard?

A. They actually separate the nectarine orchard and the family orchard.

Q. Were those Merrill Gem trees sprayed with this formula, four per cent oil, four pounds of lead arsenate and two pounds of Mitox?

A. No, they were not.

Q. At the time that the serious condition developed in the Merrill Gem orchard that is depicted by Plaintiff's Exhibit 1, did those 18 Merrill Gem trees show any such symptoms or characteristics? A. None whatsoever.

Q. Have they remained in a normal healthy condition? A. They have.

Q. Mr. Grimm, you produced some Merrill Gem peaches in 1957, did you not? A. Yes, I did.

Q. And how many did you produce?

A. We shipped 1756 boxes, or lugs. [164]

Q. And what was your gross f.o.b.—your ranch price received for those peaches?

A. \$4.38 per lug.

Q. Mr. Grimm, what does it cost you, or what did it cost you in 1957 to pick, pack, and provide the lug and liner for those peaches?

A. For the Gem peaches?

Q. Yes.



(Testimony of Charles William Grimm.)

A. Well, I had an overall figure for all of my peaches for about \$1.15 per box, but I expect this cost me more in picking than the other varieties.

Q. Were your peaches picked by piece work?

A. No, it was hour work.

Q. Well, what was the overall average price for picking?      A. For picking?

Q. Yes.

A. About 40 cents, picking and hauling.

The Court: You mean 40 cents a lug?

The Witness: Yes.

Q. (By Mr. Hamilton): And the packing?

A. Packing about 30 cents.

Q. Now, you packed your own peaches on your own ranch?

A. Yes, packed and graded. We figured that all in one.

Q. And the cost of the lug, the box itself and the liner? [165]

A. Box, paper, cover, averaged about 45 cents.

Q. Making \$1.15, total?      A. Yes.

Q. Mr. Grimm, when was this Merrill Gem peach orchard planted?

A. In 1953, in February 1953.

Q. Then by a process of mathematics it was four years old in the spring of 1957, is that correct?      A. Yes.

Q. And as you orchardists speak of it, it was going into its fifth season, is that correct?

A. That is correct.

(Testimony of Charles William Grimm.)

Q. Mr. Grimm, you have no prior history of experience with Merrill Gem peach varieties?

A. No, I have not.

Q. Mr. Grimm, in the year of 1957 did the condition of your orchard, by reason of the loss of limbs, require any extraordinary expenditures on your part? A. Yes, it did.

Q. And what were those, Mr. Grimm?

A. Well, I would say my picking cost me more money, my thinning cost me more money. Of course, removing—sawing and removing all of the limbs, and whitewashing the trees to prevent further sun burn.

Q. Did you purchase props to use in the orchard? [166] A. No, I have not yet.

Q. Will you be required to purchase props?

A. Yes, I expect to.

Q. But you have not purchased any as yet?

A. No.

Q. How many will be required for your use in the Merrill Gem orchard?

A. Well, the best I could estimate between 350 and '60.

Q. And what is the cost of those props?

A. About 50 cents each.

Q. If this damage had not occurred in your orchard, would it have been necessary for you to use props? A. No.

Q. Will there be any extra labor involved in putting out the props? A. Oh, yes.

(Testimony of Charles William Grimm.)

Q. Do you have any estimate in mind of the cost of that labor?

A. Oh, I would say somewhere probably around \$200, such a matter.

Q. How many years will it be necessary to use props, assuming that your orchard in the normal course of events shapes up?

A. I estimate at least two years.

Q. Now, the figure that you have given us of \$200, do [167] you feel that will cover that labor for the two years? A. It may.

Q. Mr. Grimm, did you find it necessary by reason of the necessity of cutting away portions of the trees to whitewash your Merrill Gem orchard?

A. Yes, I did.

Q. Why?

The Court: He has testified, I think, it prevent sun burning, haven't you?

The Witness: Yes.

Q. (By Mr. Hamilton): Have you whitewashed it? A. Yes, I have.

Q. What was the cost of the whitewashing?

A. It run about \$90, I believe.

Q. Will it be necessary to whitewash it again?

A. I think it should be whitewashed at least another year.

Q. And do you estimate that will be the same cost? A. I would think so, yes.

Q. Mr. Grimm, by reason of the condition that developed in your Merrill Gem orchard was it necessary for you to attempt to reshape your trees?

(Testimony of Charles William Grimm.)

A. Yes.

Q. Now, that would be necessary only on those trees where [168] a major limb or more had been cut away, is that correct?      A. Yes.

Q. How do you do that?

A. It is done through a process of propping and tying. It is necessary to cut either a limb or a stake, and pry between one and another and perhaps take a piece of tree rope and pull from one limb to another, and try to establish the limb in a position that will prevent sunburn and to make the tree symmetrical in shape.

Q. And is it sometimes necessary to start from a ring in the middle and then go out to the ends to pull them up, into an upright position?

A. That is right.

Q. Have you done that?

A. I have done that on part of the trees.

Q. Do you have the cost of reshaping the trees?

A. I couldn't give you that exactly, I don't believe.

Q. Do you have an estimate of it?

A. It would run several hundred dollars, I am not sure.

Q. What would be your best estimate?

A. Perhaps \$260 or '70.

Q. \$260 or \$270?      A. Yes.

Q. In October of 1957 you went into your orchard and cut away all dead wood, is that correct?

A. Yes.

Q. And that was not the ordinary pruning job,

(Testimony of Charles William Grimm.)

that was to cut away the dead wood caused by the condition that developed in the orchard during the spring?      A. Yes.

Q. What was the cost of that operation?

A. My records show that it cost me about \$480 some odd dollars.

Q. Do you have an exact figure in mind, sir?

A. I believe it was \$484.50, if I am not mistaken.

Q. What all went into making up that total?

A. Well, I happened to have a pneumatic compressor that I used on a pruning platform, and in order to save the labor that would be required to saw all those limbs I purchased a pneumatic saw that cost me \$225, and with the tractor and three men we sawed these limbs out.

Q. Now does this figure also include the hauling of the limbs away, and stacking them and burning?      A. Yes, that included the hauling.

Q. Mr. Grimm, in your opinion what was the fair market value of your Merrill Gem peach orchard on or about March 4, of 1957?

A. Well, I heard an expert testify yesterday——

Q. No. I want your opinion. You as the owner of the property are entitled to give your own independent opinion. [170]

A. Well, I would say somewhere between \$2,000 and \$2,500 an acre.

Q. The middle between there is \$2,250; is that your opinion?      A. Yes.

Q. As to its value on that date?      A. Yes.

Q. Mr. Grimm, in your opinion what is the

(Testimony of Charles William Grimm.)

fair market value of your Merrill Gem peach orchard today?

A. Well, I would estimate that it is probably between \$1,500 and \$1,600 an acre.

Q. The middle between is \$1,550. A. Yes.

Q. Is that your opinion?

A. Yes, that is what I would estimate it.

Q. Now, in fixing that value, do you take into account the fact that there will, by reason of the limbs that have been cut away, be a period temporary but certain in which you will suffer a loss in production? A. Yes, I definitely will.

Q. Well, is that fact taken into account in fixing the value of \$1,550, or is that the value you would place on it when it has reached the stage of maximum re-growth?

A. I would fix that on it after it has reached the maximum stage of re-growth. [171]

Q. And from your knowledge of peaches and knowledge of Merrill Gem, limited though it may be, when can it be expected to have reached the maximum re-growth?

A. Perhaps about four years.

Q. Is that four years from 1957, or four years from the present? A. From 1957.

Q. Mr. Grimm, Dr. Sessions was on your ranch on several occasions? A. Yes, he was.

Q. Do you recall how many?

A. I remember about three times, I believe.

Q. Was that during the spring of 1957?

A. That was during 1957.



(Testimony of Charles William Grimm.)

Q. And Dr. Sessions has been to your ranch quite recently?

A. Yes, he was there about three weeks ago.

Q. After Dr. Sessions had been there for the third time, in 1957, did you have any conversation with Mr. Fisher, the manager of Cal-Spray's Bakersfield office, concerning damage to your orchard?

A. Yes, I did.

Q. Do you recall approximately when you had that conversation, the approximate date?

A. The first time he was there was some time in March, and I have had conversations with him all during that period, [172] the several times that he was there.

Q. I am referring now to a conversation after Dr. Sessions had completed his examination. Do you recall such a conversation?

A. Yes, I remember a conversation.

Q. Do you recall the approximate date?

A. It was the last time that Mr. Fisher was there, and it was some time in June.

Q. And at the time of that conversation, and with you or with Mr. Fisher was anyone else present?

A. I don't believe there was anyone else present at that meeting.

The Court: Mr. Hamilton, I think we will take our afternoon recess. I have a long distance call from Los Angeles. Members of the jury, bear in mind the admonition I have given you. We will take a short recess.

(Testimony of Charles William Grimm.)

(Short recess.)

(Stipulated jury present.)

Q. (By Mr. Hamilton): Mr. Grimm, at the time of recess we had started to develop a conversation which you had with Mr. Hal Fisher, that I believe was in or about June of 1957, and I had asked you, I believe, who else was present besides you and Mr. Fisher, at that conversation?

A. There was no one else present. [173]

Q. What, as best you can recall, was said by you and what was said by Mr. Fisher in that conversation?

A. I inquired of Mr. Fisher when this adjuster, who he had previously indicated would come down from Richmond to settle this damage, was going to appear, that I had felt that we had exhausted our research in trying to develop any organism that might be present, and that I wanted to settle this case. And he informed me that the adjuster was not coming down, and he said as a matter of fact the next time we come down we would like to start pulling some of these trees. I told him at that time I felt that when he owned the orchard, or when he had bought the orchard he could start pulling trees, and not until then.

Q. Had you had an earlier conversation with Mr. Fisher concerning the adjuster?

A. Yes, I had.

Q. When did that conversation occur?

A. That was in the latter part of April.

Q. And where?           A. At my ranch.

(Testimony of Charles William Grimm.)

Q. And who was present at the time of that conversation, besides you and Mr. Fisher?

A. Mr. Hanna.

Q. And did you have a conversation concerning the cause of the damage to your orchard? [174]

A. Yes.

Q. If you can recall, what did you state to Mr. Fisher, and what did he reply to you?

A. I told Mr. Fisher that I thought it was oil damage and he agreed with me, and he told me not to worry, that—he said, as near as I can remember his words, that the man from Richmond that carried the checkbook would be down to see me and we will settle this case.

Q. Mr. Grimm, how long have you owned the property on which your Merrill Gem peach orchard is located?      A. Since 1942.

Q. How long have you had crops on there, such as grapes or peaches or nectarines, that might be susceptible to frost damage?

A. I believe I planted my first vineyard in 1937 or '38.

Q. 1937?      A. '47 or '48, excuse me.

Q. Since the time of that planting in 1947 or 1948, have you ever suffered any frost damage?

A. None whatever.

Q. Mr. Grimm, do you have any heating equipment?      A. No heating equipment.

Q. In your opinion at your ranch and from the history of it, would you completely discount frost

(Testimony of Charles William Grimm.)

as being a factor in connection with expectable production in future years? [175]

A. Well, I don't know that I could over future years. From the historical standpoint I could say for the next ten years perhaps, I could say it would be of minor importance.

Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Mr. Grimm, you in the past were in the farm adviser's office in Kern County, were you not? Or the agricultural commissioner's office?

A. Yes, county agricultural commissioner.

Q. County agricultural commissioner, and during what years?

The Court: Well, I don't quite understand your question. You asked Mr. Grimm if he was in the——

Mr. Barnard: County agricultural commissioner's office.

The Court: What do you mean by "in"?

Mr. Barnard: Employed by them?

The Court: Oh.

Mr. Barnard: I will withdraw my previous question.

Q. You were the county agricultural commissioner for Kern County? A. Yes.

Q. And what years?

A. I was commissioner from 1951 to '54—correction, [176] '50 to '53.

(Testimony of Charles William Grimm.)

Q. 1950 to 1953. Was Mr. Harper employed in that office while you were there?

A. Yes, I employed Mr. Harper about three months prior to my retirement.

Q. All right. Now, this morning in explaining your diagram, Mr. Grimm, you stated that the Xs—

The Court: Are you talking about Plaintiff's Exhibit 1?

Mr. Barnard: Yes, for the record, Plaintiff's Exhibit 1.

Q. You stated that the Xs represented undamaged limbs, or major limbs which were undamaged, and that the various numbers from one to three represented the number of primary or scaffold limbs that were cut from each tree, is that correct?

A. Maybe I misunderstood the first part of your question.

The Court: Let's read it, Miss Schulke.

(Question read.)

The Court: Well, I think you better reframe that question, Mr. Barnard.

Mr. Barnard: Very well.

Q. It was your testimony, Mr. Grimm, was it not that the Xs represented trees in the Merrill Gem orchard that were undamaged insofar as major limbs were concerned?      A. That is correct.

Q. And that the figure one represented trees in that [177] orchard from which you had had to cut one major limb?      A. That is correct.

(Testimony of Charles William Grimm.)

Q. And likewise the figure two meant two major limbs had been cut? A. Yes.

Q. And that the figure three meant that three major limbs had been cut?

A. Yes, that is right.

Q. You testified also that the average number of major limbs was five? A. Yes.

Q. So that if you had had to cut all five major limbs you then classified the tree as a stump, and the letter S appears? A. Yes.

Q. I notice that on the diagram, Plaintiff's Exhibit 1, there were no trees from which you had to cut four major limbs? Is that true?

A. That is true, there is no four.

Q. Did it just happen that there were no trees with four, or did you cut the fourth—did you cut all the limbs off if four had been damaged and only one remained?

A. We didn't cut any limbs that were not dead.

Q. Very well. Now, Mr. Grimm, you filed your original complaint in this action on July 24th of 1957, did you not? [178]

A. I believe that is right.

Q. In the Superior Court in Kern County?

A. Yes, that is correct.

Q. And at that time you were familiar with the condition of your orchard, were you not?

A. Yes.

Q. And as a matter of fact, the damage was apparent? A. Yes, it was.

Q. The trees that were going to die had died?



(Testimony of Charles William Grimm.)

A. Well, I wouldn't say that.

Q. Well, did any limbs die after July?

A. Yes.

Q. They did.                      A. Yes.

Q. In other words—withdraw that. Did any entire trees die after July?

A. No, I don't believe so.

Q. Your original complaint was a verified complaint, was it not?                      A. Yes.

Q. And you swore to it as being true?

A. Yes.

Q. And in that complaint you alleged that out of 1090 trees in the Merrill Gem orchard 582 had been destroyed, is that correct? [179]

The Court: Well, I think if you have a copy of the complaint you should show it to the witness.

Q. (By Mr. Barnard): I will show you, Mr. Grimm, a copy of the original complaint and call your attention to paragraph 7.

A. This is probably not correct because we did not have 1090 trees in that orchard.

Q. But you did file this complaint alleging the existence of the 1090 trees?                      A. Yes.

Q. And alleging that 582 trees had been destroyed?

A. That is what it says there, all right.

Q. When did you finally count the trees in your orchard?

A. I believe that we actually took the count when I made this chart.

Q. And by this chart, you are referring to

(Testimony of Charles William Grimm.)

Plaintiff's Exhibit No. 1?           A. Yes.

Q. When was that?

A. That was in late October, I think.

Q. Of 1957.           A. '57.

Q. And at that time you discovered, did you, for the first time, that you only had 726 trees?

A. I—that reminded me that I had 726 trees.

Q. And in preparing the chart, Plaintiff's Exhibit 1, you testified that you went through your orchard tree by tree?           A. Yes.

Q. So you discovered a total of 300 and—withdraw that. You discovered a total of 691 limbs had been cut?

A. I didn't take that count, I don't think.

Q. Well, you discovered the total of the limbs that show on this chart as having been cut?

A. Yes.

Q. And with 726 trees containing an average of five limbs per tree, there would be some 3,600 limbs on the trees?           A. I didn't work it out.

Q. That is just mathematical.

A. Yes, mathematical.

Q. Now, in the spring of 1957, prior to the application of the spray material to your Merrill Gem trees, had you irrigated the Merrill Gem orchard?

A. Yes, we had.

Q. And when did that irrigation take place?

A. We planted a cover crop in October, and grew a cover crop during the winter, and we had irrigated the orchard about a week prior to spraying.

(Testimony of Charles William Grimm.)

Q. Was that the only irrigation, or had you irrigated it throughout the winter? [181]

A. We had irrigated throughout the winter.

Q. And the last irrigation then was approximately a week prior to spraying?      A. Yes.

Q. Did you have any infestation or presence of any insects present in your orchard around March 1st, or shortly prior thereto?

A. We had evidence of deposits of mite eggs in the orchard. Tim Hanna reported to me that he found both parlatoria scale and San Jose scale, on the peach trees.

Q. Did you have any peach tree twig bore?

A. I had not detected any peach twig bore.

Q. Had you looked for it?      A. Yes.

Q. Now, you testified that when Mr. Hanna suggested an application of the formula which was ultimately used that you objected to the use of four per cent oil?      A. I did.

Q. Had you used oil before on your peach trees?

A. Never had used it.

Q. Had you used oil on any other trees?

A. No.

Q. Upon what information then did you object to four per cent of oil?

A. Well, I had spent 27 years in the department of [182] agriculture, and during that period of time I have seen some damage caused from excessive oil use.

Q. Do you know what kind of oil had been used in the instances in which you saw damage?

(Testimony of Charles William Grimm.)

A. No, I don't recall what types of oil they were.

Q. As a matter of fact, it is customary to use a heavy oil in the wintertime spraying, isn't it?

A. Yes, normally you use a heavier oil in the winter than you would in the summer.

Q. Now, is Kern County a peach growing area?

A. Kern County is a new peach growing area.

Q. About how long ago did it start?

A. The oldest orchard is only 15 years old.

Q. I see. And had they tried to grow peaches in Kern County at any time in the past?

A. Yes.

Q. Then the orchards that had been planted were then pulled out, is that correct?

A. Yes.

Q. What was the reason?

A. It was because they attempted to grow peaches on a peach root. Later on they developed new types of roots more resistant to nematodes, and from those roots we were able to establish orchards in lighter soil.

Q. In other words, it was with the development of a new [183] type of peach tree?

A. Well, both tree variety and root stock.

Q. How many orchards are there in Kern County at the present time, do you know, that is peach orchards?

A. Well, I don't know.

Q. It isn't a major crop in the area?

A. No, it is not.

Q. Now, on March 5th and 6th, at the time this

(Testimony of Charles William Grimm.)

spraying was done, can you tell me, first, the condition of the Gold Dust trees insofar as leafing and budding is concerned?

A. As best I remember, the Blazing Gold were farther advanced than the other two varieties, and there were a number of blossoms open the day we applied the material. The balance of them were in what I referred to as the popcorn stage, or where the buds had started to crack open.

Q. Can you give me an estimate of the percentage of the Gold Dust blossoms that were virtually out?

A. They were perhaps 50 to 60 per cent that were well along.

Q. In other words, of the buds on the Blazing Gold trees between 50 and 60 per cent were either in full blossom or at least partially open?

A. No, I didn't say in full blossom; they were cracked open.

Q. But they were not open? [184]

A. There were very few that were actually open. They were in the advanced pink bud stage.

Q. And what about the leaves?

A. The tips of the leaves were starting to show.

Q. Can you give me a percentage of the Gold Dust buds and blossoms out?

A. They are normally about three days behind the Blazing Gold, and I would roughly estimate maybe 30 or 40 per cent were in about the same stage as the Blazing Gold.

Q. And the Merrill Gems, can you estimate——

(Testimony of Charles William Grimm.)

A. The Merrill Gems were in pink bud.

Q. Were any of the blossoms opened?

A. In the what?

Q. In the Merrill Gems?

The Court: You mean any of the buds?

Q. (By Mr. Barnard): Any of the buds?

A. Yes, there were probably a few buds.

Q. Can you give me an estimate of the percentage?

A. Well, it was very small. You would find an occasional bud, or blossom open.

Q. Would you say there was approximately five per cent?      A. That may be correct.

Q. Five per cent of the buds were opened?

A. Yes. [185]

Q. And the same percentage applied to the leaves?

A. Well, the leaves were not open in that sense. The leaf comes out after the fruit blossom opens, and the tips of the leaves, or the points of the leaves were visible.

Q. All right. Now, who applied the spray?

A. We did; my men did.

Q. Your own employees?      A. Yes.

Q. And what type of spray rig was used?

A. We have a Hardy 600-gallon Hardy sprinker.

Q. Is that pulled behind the tractor?

A. Yes.

Q. And how many nozzles are on the rig?



(Testimony of Charles William Grimm.)

A. For spraying trees there are two, but we have other nozzles.

Q. In this spray operation that was used here two nozzles were used, is that correct?

A. That is correct.

Q. In other words, two men walked behind the rig and sprayed, one sprays to the right and one sprays to the left? A. That is right.

Q. Do you know what part of the orchard they started on?

A. Yes, we started on the southeast corner.

Q. Southeast corner. And then did you progress in a northerly direction, alternating the direction in each row? [186]

A. Yes, we started on the southeast corner and we didn't complete the first two rows. We had to fill the tank and we went back in the same rows, on the outside rows, and then came back the second and third row, until we used the material, and then we started back from the east again.

Q. Did you observe the spraying operation yourself? A. I helped put on part of it.

Q. And were you satisfied that a complete coverage was being obtained on each tree?

A. Yes, I was.

Q. In other words, the tree in the middle of the orchard would be sprayed first from one row on one side and then from the other row on the other, is that right?

A. I don't quite follow your question.

Q. Well, in other words, the men operating the

(Testimony of Charles William Grimm.)

spray did not walk around an individual tree?

A. Yes, they did.

Q. While the rig was going down the row they would walk about each tree?

A. They had 50-foot lead lines on the nozzle, the spray rig is pulled up and stopped and the men walk around the tree and spray the tree, and it is—complete tree at a time.

Q. And you are satisfied that a complete coverage was being obtained on each tree?

A. That is correct. [187]

Mr. Hamilton: Your Honor, I am going to object to this line of questioning, and going further with it, on this basis: I am under the impression that we have the stipulation that this spray was applied in the manner recommended by Cal-Spray. Therefore, I see no object to be gained by going into the mechanical operation of it. I do not want to unduly hamper counsel in his cross examination, but this certainly was not gone into on direct examination on the basis of the stipulation.

Mr. Barnard: I believe, if the Court please, that it was proper. However, I had finished that particular line.

The Court: As long as it is finished, I guess there is nothing for me to rule on.

Mr. Hamilton: The objection is withdrawn.

Q. (By Mr. Barnard): Now, Mr. Grimm, approximately how long was it after the spraying was completed on March 6th before you noticed anything unusual in your orchard?

(Testimony of Charles William Grimm.)

A. It was about a week, the best I remember.

Q. And what was the first thing that you noticed?

A. I observed that in the Blazing Gold there seemed to be a burning of the blossoms that were open, the pistils at the end of the fruit had begun to dry and curl; most of the fruit, or some of the fruit—I shouldn't say much of the fruit, but some of the fruit was beginning to shatter. [188]

Q. To what? A. Shatter, fall off.

Q. In other words, in the week between March 5th and 6th, and the time that you noticed this condition, some of the blossoms had turned into fruit? Is that right?

A. No, not the fruit itself. When the blossom opens the pistil is present with the blossom, and they began to show a burning or drying, dessication, and the blossoms began to drop.

Q. That is what you meant when you said some of them began to drop? A. Yes.

Q. You didn't mean the fruit?

A. No, the fruit had not yet formed.

Q. All right. Now, at that time had all of the blossoms on the Blazing Gold come out?

A. No, not all of them.

Q. Did those which had not come out later come out in the normal manner? A. Yes.

Q. And did they continue to develop leaves and—that is, blossoms develop fruit? A. Yes.

Q. Did the leaves which were not opened on March 5th and 6th then open in a normal manner?

(Testimony of Charles William Grimm.)

A. Yes.

Mr. Hamilton: May I inquire whether we are still talking about the Blazing Gold?

Mr. Barnard: Yes.

The Court: That is my understanding of it.

A. They did develop in a normal manner.

Q. (By Mr. Barnard): Then I believe you testified that after a short period of time this condition seemed to disappear from the Blazing Gold trees?

A. Yes.

Q. From then on they developed in a normal manner? A. Yes.

Q. And they produced a normal crop?

A. Yes.

Q. Now, approximately how long was it after you first noticed this condition in the Blazing Gold trees before it had all cleared up?

A. Well, it was a couple of weeks that there was some evidence of it.

Q. In other words, then, in approximately three weeks after the spraying had been completed the Gold Dust trees were growing in a normal manner?

A. Are we talking about the Gold Dust, or Blazing Gold?

Q. I beg your pardon, Blazing Gold. [190]

A. Yes, that is correct.

Q. And they continued so the rest of the season?

A. Yes.

Q. Now, the Gold Dust trees, Mr. Grimm, did you ever notice anything unusual in that part of the orchard?

(Testimony of Charles William Grimm.)

A. There were two trees that showed the same symptoms as we found in the Merrill Gems.

Q. When did that condition first appear?

A. We didn't notice that until probably about the time that the Merrill Gems began to show symptoms.

Q. And did that condition appear in any other trees in the Gold Dust at a later time?

A. No, those two continued to show symptoms most of the summer.

Q. But it didn't appear in any other trees?

A. No, except in the bud blossoms as in the Blazing Gold.

Q. In other words, do I understand that the Gold Dust trees exhibited the same condition as far as the blossoms which were opened?

A. We could find some evidence of burning.

Q. In the blossoms?      A. In the blossoms.

Q. Yes. But the blossoms which were not opened when the spraying took place then opened in a normal manner?      A. They seemed to. [191]

Q. And the leaves which were not out then came out in a normal manner?

A. Well, all of the leaves came out in a normal manner.

Q. And with the exception of the two trees that you have mentioned that exhibited somewhat the same symptoms as the Merrill Gems, all of the balance of the Gold Dusts developed normally throughout the rest of the year?      A. That is correct.

Q. And they produced a normal crop?

(Testimony of Charles William Grimm.)

A. Yes.

Q. Did the two trees which were affected in a manner similar to the Merrill Gems produce a crop?

A. On about a fourth of the tree they did not produce a crop.

Q. In other words, about three-fourths of the tree was normal? A. Yes.

Q. Did any of the limbs die on those two trees?

A. Some of the small twigs, but no primary limbs died.

Q. Where were those trees located in your Gold Dust orchard? A. Near the northwest corner.

Q. The northwest corner of the Gold Dust orchard? A. Yes.

Q. And how many rows of Gold Dust do you have, do you [192] remember as to that?

A. I think 12 or 13 rows, 14.

Q. So they would be separated from the Merrill Gem trees by some ten or twelve rows?

A. That is correct.

Q. In other words, they were not contiguous?

A. No.

Q. Now, when was the first time that you noticed something in the Merrill Gems?

A. It was,—I believe Tim Hanna called my attention to it. It was a tree near the road, near our driveway and he thought it was a fertilizer deficiency.

The Court: I think the question was, Mr. Grimm, when did you notice it. When?

The Witness: Oh, when. Thank you. It was



(Testimony of Charles William Grimm.)

about the time that we were watching these blossoms and the possible injury to those—to the other varieties of fruit.

Q. (By Mr. Barnard): In other words, some time approximately one week after the spraying, but less than three weeks?

A. I would say that is near correct.

Q. Did you then go out into the orchard with Mr. Hanna?      A. Yes.

Q. And examine this tree?      A. Yes. [193]

Q. What was its condition when you first examined it?

A. It looked very yellow and sickly, and he suggested that we put a leaf feed on it to see if we couldn't revive it.

Q. And as a matter of fact, he brought you out a bag of leaf feed?      A. Yes.

Q. But you didn't apply it?

A. We didn't apply it.

Q. How long after you noticed this first tree did you notice the condition in some of the other trees?

A. It was within a few days.

Q. And then did it gradually spread throughout the orchard?      A. Yes, it did.

Q. In other words, it didn't come out in all trees on the same day?      A. No.

Q. First you noticed it in one tree, a few days later there might have been ten or fifteen trees?

A. Yes, that is correct.

Q. And then a few days later another ten or twenty? Is that the way it happened?

(Testimony of Charles William Grimm.)

A. Well, it also happened you would see a small spot on one tree, and you would find another spot on another tree, and then it began to progressively get worse. [194]

Q. But it did not happen all at once?

A. No.

Q. But it got progressively worse?

A. It did get progressively worse.

Q. For how long a period of time did the orchard continue to get progressively worse?

A. Well, for about, I would say probably about a month, a month's time.

Q. In other words, that would be for a period of time approximately six weeks after the spraying?

A. It could be, a month or six weeks.

Q. From the time it started?

A. From the time it started.

Q. From the time you first noticed it which was a little more than a week after the spraying, is that correct?

The Court: You will have to speak audibly, Mr. Grimm?

A. Yes, that is correct.

Q. (By Mr. Barnard): Now, I am not trying to tie you down to six weeks exactly, don't misunderstand me. Six or eight, or something like that?

A. It's within that period of time.

Q. For a period of six or eight weeks, or somewhere in that neighborhood, the trees got progressively worse? A. Yes, that is correct. [195]

Q. And then what happened?

(Testimony of Charles William Grimm.)

A. They seemed to stand still.

Q. In other words, the condition didn't get worse, but it didn't get better?

A. That is right. They stood still for, well, I believe until June or July, we began to see some new growth on some of them.

Q. All right. Then for whatever period it is until some time in June or July they stood still. Then would you say they started to improve?

A. Yes, they did.

Q. None of the limbs which had actually died came back?      A. No.

Q. But new shoots came up?

A. That is correct.

Q. Where did they come from?

A. They came from all parts of the tree.

Q. From all parts of the tree?

A. Yes, except the dead areas, of course.

Q. Naturally. Did the condition of the trees then gradually improve from then on through the balance of the growing year?

A. Yes, they improved progressively.

Q. Until in September, or approximately September, at a casual observation the orchard looked fairly normal, didn't it? [196]

A. Yes, the new growth had masked over the deadwood and the leaves had dropped over and they were pretty well concealed.

Q. The dead limbs were still there?

A. Yes.

Q. And they were not cut off until October, but

(Testimony of Charles William Grimm.)

the trees had leafed out enough it was pretty well masked?      A. That is right.

Q. Now, going back to when the condition was at its worst, Mr. Grimm, what did you see on a visual observation of your trees?

A. I saw the south side devoid of foliage in most cases. From the tip to the trunk, and in some cases the trunk, the bark, cambium, had died, and in many cases the dead bark was on the south or—I might say the lower portion of the limbs, the top of which would still be green, and growing branches and foliage. The fruit that was on the limbs some completed to maturity, and on the same limb you would have all sizes of fruit from—anything from the size of a peanut to the size of a golf ball, and they hung there all winter—all summer and up into the winter. They would not develop.

Q. Had you finished?

A. I think that just about covers it.

Q. In examining your trees, did you find the cambium layer, when you peeled the bark, was dark? [196-A]

A. Yes, it was discolored.

Q. And did you find that on portions of the trees, of the trunks and the limbs there was oozing juice?      A. No.

Q. You didn't find any of that?      A. No.

Q. Did you find that when you peeled the bark it had a sour smell?

A. I couldn't detect that.

Q. You couldn't?      A. No.

(Testimony of Charles William Grimm.)

Mr. Barnard: Pardon me, your Honor. I thought I had the page number and I apparently didn't.

Q. Mr. Grimm, do you recall that your deposition was taken in this action on December 13th—

A. Yes.

Q. —1957? May I have the original?

I will hand you the original of that deposition, Mr. Grimm, and ask you to read on page 56, read to yourself, on page 56, commencing with line 17, running through to page 57 and through line 3—or through line 6.

A. According to this I did smell it.

Q. Have you finished reading it, Mr. Grimm?

A. I read down to line 25.

Q. Read down to what? [197]

A. To line 25.

Q. Then over on page 57, through line 6.

A. If I did I had forgotten it because I couldn't—I didn't remember the smell.

Q. May I ask you again, you remember the taking of your deposition?      A. Yes, I do.

Q. And at that time were these questions asked you and these answers given by you:

“Q. From your investigation while observing these trees closely after you discovered this condition did you notice any sour smell when you cut through the bark?      “A. Yes.

“Q. Was that rather prevalent throughout the entire orchard?

“A. Any of the limbs which had the cambium layer damaged released a sour smell.

(Testimony of Charles William Grimm.)

“Q. Was that same cambium layer darker than usual?      “A. Very much so.

“Q. Was that condition common throughout the entire orchard?

“A. Yes, wherever the condition existed.

“Q. But where the condition did not exist and where the limbs or trees were seemingly unaffected then [198] the cambium layer was normal?

“A. Yes.”

Were those questions asked you, and did you give those answers?

A. Yes, that is correct.

Q. Now, Mr. Grimm, referring to Plaintiff's Exhibit 2, which is the invoice for the purchase of part of the material, there appears on that document the notation “for experimental sale.”

A. Yes.

Q. And you testified that nothing had been said to you about any experiments?

A. That is correct.

Q. Do you know what that term means on that invoice?

A. You mean the term “experimental sale”?

Q. For experimental sale?

A. No, I don't know what it means.

Q. Now, referring to Plaintiff's Exhibit 5 through 9, which I believe are the colored pictures, are they not? You recall these are the colored pictures of your orchard?      A. Yes.

Q. Did I understand you to mean that these pic-



(Testimony of Charles William Grimm.)

tures were progressive from April through the middle of July, and showed the condition of the orchard at various times, or were they all taken on the same day?

A. They were all taken on the same day. [199]

Q. They were taken then in July?

A. As best I remember it was about that time.

Q. I see. And on these pictures you can see, can you not, the fruit which has remained on the branches?      A. Yes, that is correct.

Q. In other words, the little dark spots you see are undeveloped peaches?

A. Yes, there is fruit on some of these trees.

The Court: Mr. Grimm, will you speak up loudly.

A. There seems to be fruit on some of these trees. It might indicate that these pictures were taken prior to July.

Q. (By Mr. Barnard): And in fact one of the pictures shows considerable fruit that can actually be recognized as peach, does it not?      A. Yes.

Q. That is where the man is picking them.

A. Yes, that is correct.

Q. What I was referring to first, Mr. Grimm, these little dark spots——

A. Those are fruit.

Q. ——that appear on the branches that have no foliage on them are the undeveloped peaches that you were referring to?      A. Yes.

Q. As a matter of fact, your Merrill Gems were picked before July, weren't they? [200]

(Testimony of Charles William Grimm.)

A. Yes, they were picked, we started picking on June 4th, actually.

Q. And when did you complete the picking?

A. Our last shipment was on June 11th.

Q. So at least one picture which shows the peaches on the tree must have been taken during that time?

A. I would say it was taken prior to that time.

Q. Prior to June 11th?

A. I would say that.

Q. And all the pictures were taken at the same time?      A. Yes.

Q. Now, the other pictures that have been introduced in evidence, Mr. Grimm, as Plaintiff's Exhibit 10, do you remember the set of 16 pictures?

A. Yes.

Q. 10-A and 10-B being pictures of normal trees?      A. Yes.

Q. The rest show the cutting that was necessary.      A. Yes.

Q. Those pictures show foliage on those trees, do they not?

The Court: Show the witness the exhibit. Mr. Grimm, note the Clerk's mark 10-A will designate it. You see the Clerk's mark on there?

The Witness: Yes. [201]

Q. (By Mr. Barnard): Here is 10-A and 10-B, and those are his notations.      A. Yes.

The Court: Did you have a question, Mr. Barnard?

(Testimony of Charles William Grimm.)

Q. (By Mr. Barnard): I asked Mr. Grimm if those pictures didn't show foliage on the trees.

A. Yes, that is correct.

Q. And was it your testimony that those pictures were taken in December or January, that is December of 1957 or January of 1958?

A. These pictures were taken quite recently. If I could have the folder these originated in I could get you the exact date on them. These were taken this year, I believe.

This was the last group of pictures that I took, and they were developed on March 24th, and I took them just a few days before. This other group was the ones I took in——

Q. And they were developed on March 24th?

The Court: Let's be sure we understand Mr. Grimm's statement. Certain pictures were developed March 24th?

The Witness: Yes, that is this group of pictures.

The Court: What group is that? Is that the 10?

The Witness: Yes.

Mr. Barnard: That is Plaintiff's Exhibit 10, Mr. Grimm.

The Witness: Yes. [202]

The Court: All right. Now, you said the "other group," I don't know which ones you were referring to?

The Witness: The small Kodak pictures were taken shortly after and during pruning time.

(Testimony of Charles William Grimm.)

Mr. Barnard: Are you referring to Plaintiff's Exhibit 11?

The Witness: Yes. They were taken during pruning time, or about the——

The Court: I think you will have to speak louder, Mr. Grimm.

The Witness: They were taken during pruning time.

Q. (By Mr. Barnard): Now, you stated, Mr. Grimm, that the pictures represented in Plaintiff's Exhibit 10 were developed on March 24th. That leaves one gap. Did you have them developed as soon as you took them? A. Yes, I did.

The Court: That is this year, 1958?

The Witness: This year.

Q. (By Mr. Barnard): So it is your testimony now then that Plaintiff's Exhibit 10, consisting of a group of pictures—— A. Yes.

Q. ——was taken in March of 1958?

A. That is correct.

Q. And they are pictures of your orchard?

A. Yes.

Q. Plaintiff's Exhibit 11, which is also a group of pictures and which are the colored ones, were taken around pruning time of 1957, which would be in the fall?

A. Sometime during the winter.

Q. Sometime during the winter. Now, what about Plaintiff's Exhibit 10-A, Mr. Grimm, and 10-B and 10-C.

(Testimony of Charles William Grimm.)

A. These were taken at the same time as this other series of 10 were taken.

Q. In other words, all of Plaintiff's Exhibit 10 were taken at the same time?      A. Yes.

Q. And that was in March of this year?

A. Yes.

Q. So that the pictures in Plaintiff's Exhibit 10 show the condition of the foliage as it now exists, or as it existed in March of this year?

A. Yes.

Q. And not as it existed at any time in 1957?

A. That is correct.

Q. Now, in 1957 you produced 1756 boxes of Merrill Gem peaches, is that correct?

A. That is correct.

Q. I believe at one time you used the word "lug"; do you use those two words interchangeably? [204]      A. Yes.

Q. In other words, whenever you refer to a lug or box you mean the same thing?      A. Yes.

Q. What size is that?

A. That is a regular L.A. lug, two layer pack; what we commonly refer to as L.A. lug.

Q. Two layers of peaches in it, and approximately how much does it weigh?

A. From 17 to 20 pounds, depending on the size, net.

Q. Do you know how many lugs or boxes of Merrill Gem peaches you produced in 1956?

A. Yes, I produced 1423 lugs.

(Testimony of Charles William Grimm.)

Q. 1423. Now, you testified that it cost you \$484.50 to cut away the dead wood.

A. And to haul it out.

Q. And to haul it out. You testified that in order to do this you bought a pneumatic saw?

A. Yes.

Q. Was the price of the saw included in the \$484.50? A. Yes, it was.

Q. You still have the saw? A. Yes.

Q. And it is still in working order?

A. Yes. [205]

Q. Now, your estimate of the fair market value of your orchard prior to 1957 was \$2,250?

A. Yes, I believe that is about right.

Q. And your estimate of the fair market value afterwards was \$1,550. I just want to be sure. Is that your opinion of the value after all of the trees have grown back to full growth?

A. Yes, I believe that would be the difference that I would lose if I attempted to sell that orchard four years from now, five years from now, as of today's value.

Q. I am not sure I understood.

A. What I mean to say is that I would be penalized in a market, I believe, about \$700 an acre at any time that I would attempt to move that orchard.

Q. You mean if you tried to sell it today, or next year, or if you tried to sell it five years from now?



(Testimony of Charles William Grimm.)

A. There is a certain permanent damage affixed to the orchard that will never recover, I believe.

Q. And that in your opinion is approximately \$700 an acre?

A. I believe that would be near correct.

Mr. Barnard: If the Court please, I believe that I have finished with Mr. Grimm almost, if I might have just a few minutes to check over my notes.

The Court: How long do you think it will take, Mr. Barnard? [206]

Mr. Barnard: Oh, three, four or five minutes.

The Court: Well, we will take a very short recess then. Members of the jury, keep in mind the admonition I have given you. We will take a short recess.

(Short recess.)

The Court: The jury is present, gentlemen?

Mr. Hamilton: So stipulated.

Mr. Barnard: Mr. Grimm, I have just one more question:

Q. Can you estimate for me the length of time that elapsed between the time that you noticed the first Merrill Gem tree, or the condition of the first Merrill Gem tree to be something wrong, and the time that the last tree got sick later on?

A. Well, it was perhaps a month or six weeks that the whole orchard seemed to deteriorate, and some of those trees are still showing signs of deterioration. I found a new limb just recently that had died from the tip down, on one tree.

Q. Died in 1958?

(Testimony of Charles William Grimm.)

A. It died after we pruned it, in probably December of this year.

Q. Have your trees been sprayed with an oil spray since March 6, 1957?

A. They have not.

Q. All right. Now, I think you misunderstood my first [207] question. I realize you have already testified as to how long the condition existed, and you testified it started with one tree, and as days went on you noticed more and more and more trees. Can you estimate for me the length of time that elapsed between the date you saw the first tree and the date that finally the last tree got sick that did get sick? The condition of course remained in the trees for a long period of time. Do you understand my question?

A. Yes, I think I understand the question. We began to watch that first tree, and suddenly we began to see the symptoms on many trees, and it seemed that overnight the whole, or most of the orchard collapsed, and it stayed—it continued to collapse for a period of a month or more, and then it seemed to stay in about that position, and then began to recover.

Q. Did the condition show up in any given tree a month later for the first time?

A. No, there were symptoms on most—well, I would say that most of the trees showed symptoms early and continued to develop more symptoms as time progressed.

Q. Then what I am trying to get is when was

(Testimony of Charles William Grimm.)

the last time that a tree showed symptoms for the first time?

A. Oh, I don't know that I can answer that question. I believe that the injury was within a relatively short period; in other words, with a week or ten days all the trees [208] that became affected seemed to become affected.

Q. Within a week or ten days after you noticed the first tree it had spread to all that it was ever going to spread to?

A. I believe that is right.

Mr. Barnard: I have no further questions.

The Court: I think, gentlemen, we will recess for the night now.

Mr. Hamilton: Very well.

(Admonition to the jury, and recess at 4:15 p.m., to 9:30 a.m., April 10, 1958.) [209]

Thursday, April 10, 1958, 9:30 a.m.

The Court: Do counsel stipulate the presence of the jury?

Mr. Hamilton: So stipulated.

Mr. Barnard: So stipulated.

#### CHARLES W. GRIMM

the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Hamilton: Counsel, had you finished your cross?

Mr. Barnard: Yes.

(Testimony of Charles William Grimm.)

Redirect Examination

Q. (By Mr. Hamilton): Mr. Grimm, on cross examination yesterday it was brought out that part of the expense that you gave to me as the cost of removing the dead wood from your orchard, hauling it out, stacking it and burning it, was a pneumatic power saw, and I believe you stated that the saw cost \$225, is that the correct figure?

A. That is correct.

Q. And you still have that saw?

A. Yes, sir.

Q. Did you purchase that saw solely and exclusively because of the amount of work necessary in removing the timber from the orchard?

A. Yes, sir. [212]

Q. Do you have any further use for it?

A. Not immediately, at least.

Q. You may at some future time have some use for it?      A. It may be.

Mr. Hamilton: Mr. Grimm,—and counsel, this I think should have been covered on first direct examination, but I will ask it now with your leave:

Q. Your ordinary expenses of caring for your orchard, such as annual irrigation, fertilization, the ordinary spraying programs, will those expenses be any greater, or any lesser, by reason of the present condition of your orchard?

A. Well, I would expect that I would probably have to use a good deal more fertilizer to increase the growth of the trees, and I am sure that I will have a pruning expense additional over what would

(Testimony of Charles William Grimm.)

be considered normal. As far as irrigation, I don't think that I would probably have any additional expense in that.

Q. Do you have, sir, any estimation of the additional expense of fertilization that will accrue to you by reason of injury to your orchard?

A. Well, that would be entirely speculative. I would have to see the results of the growth to determine whether or not they will actually need fertilization.

Q. In other words, as you sit there now it would be [213] entirely a guess?

A. Yes, it would be a guess.

Q. Then, for the purposes of your contention concerning damages, can we conclude that so far as the ordinary expenses of taking care of your Merrill Gem peach orchard, as they heretofore existed annually and will hereafter exist annually, will be the same?

A. I think that might be concluded.

Q. Mr. Grimm, on cross examination it was pointed out to you that when your deposition was taken you indicated at some time or another you detected the presence of a sour odor, and you stated on the witness stand in court on direct examination—pardon me, I believe on cross examination, that you did not detect any sour odor. There is an inconsistency. Do you have any explanation for that apparent inconsistency?

A. I believe so. When I gave my deposition I used the word "sour", and I probably misused the

(Testimony of Charles William Grimm.)

word as being descriptive of what I really meant. At the time the investigation was going on, with the men that we had from the various departments, the question often arose and always arose as to whether or not a smell was detectable, and at that time I couldn't smell it. But later in the summer it seemed I could detect an odor of some sort, and when we finally cut those large limbs with that power saw you [214] could very definitely get an odor, which, if I had a choice of words now, I would say was more of a fermentation smell than a sour smell.

Mr. Hamilton: I have no further questions.

#### Recross Examination

Q. (By Mr. Barnard): Mr. Grimm, I have just one question. You recall again when we took your deposition? A. Yes.

Q. Do you recall the testimony that I read to you yesterday concerning that? A. Yes.

Q. You will recall that the question I asked was directed to the time that this condition first arose, and the time that you were examining these trees carefully, and not to the fall, isn't that true?

A. The times that we were examining these carefully was quite late in the spring or early summer.

Q. In other words, when the condition first came about in your orchard, you didn't pay much attention to it, is that what you mean?



(Testimony of Charles William Grimm.)

A. No, I mean that when the damage first occurred I could not detect any odor at all.

Q. But you did examine your orchard carefully and watch it day by day, from the first minute this condition [215] existed?

A. Well, I wouldn't say day by day; every occasion that we could.

Q. Every time you could get out there, you did, right?      A. Yes.

Q. And you testified on direct examination that you and Mr. Hanna both looked at it carefully?

A. Yes.

Q. And you watched this condition exist?

A. That is right.

Q. And you were trying to figure out what was wrong?      A. Yes.

Q. All right. Now, I ask you again, do you want to see the original?

A. No, I think I remember.

Q. I ask you again if you remember in the taking of your deposition these questions were asked:

“Q. From your investigation while observing these trees closely after you discovered this condition did you notice any sour smell when you cut through the bark?      “A. Yes.”

Now, that question was asked, wasn't it?

The Court: I think there is no question, Mr. Grimm stated yesterday the questions which you read to him were [216] asked, and he gave the answers. Is that right, Mr. Grimm?

The Witness: Yes, sir.

(Testimony of Charles William Grimm.)

Q. (By Mr. Barnard): And is it your testimony now that in answering "yes" to that question you were thinking of some time later?

A. That is correct.

Mr. Barnard: Very well. That is all.

(Witness excused.)

The Court: Next witness?

Mr. Hamilton: We will call Grant Merrill.

### GRANT MERRILL

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Grant Merrill.

The Clerk: Have that seat.

### Direct Examination

Q. (By Mr. Hamilton): Your name is Grant Merrill, is that correct?      A. That is right.

Q. Mr. Merrill, where do you reside?

A. My home is in Red Bluff, California.

Q. What is your business or occupation, sir?

A. I am a peach grower and shipper and plant breeder.

Q. You are, are you not, the father of the Merrill Gem [217] peach?

A. I originated that variety, yes.

Q. How long have you been in that business, the business of raising peaches, business of breeding varieties of peach trees?

A. Well, I planted my first peach orchard in 1928, and we started our first work on breeding

(Testimony of Grant Merrill.)

new varieties of peaches and nectarines about 1930.

Q. In other words, you have been in that business for 28 to 30 years? A. That is right.

Q. How much peach orchard do you have under your personal direction and control? How many acres?

A. Well, we have 95 acres, plot in Red Bluff, that is either in commercial orchard or in experimental work breeding peaches and other fruits. All the 95 acres is in except for a few walnuts, and building sites. Then we have another 44 acres there. Then we have 60 acres at Bakersfield, and then we have a new planting of 150 acres under lease in the orchard at Bakersfield.

Q. The only two areas in which you have peach orchards then is in the Red Bluff area and in the Bakerfield area? A. That is right.

Q. Mr. Merrill, your orchard in the Bakersfield area, how far is it from the Grimm Merrill Gem peach orchard? [218]

A. Oh, I guess it is a little better than ten miles, 10 or 12 would be my estimate.

Q. Is that orchard of yours all Merrill Gems?

A. No, only a portion of it.

Q. In your 30 years of working with peaches, Mr. Merrill, have you observed and know the figures on sales of peach orchards over that period of time?

A. Oh, more or less; I think as you observe in your business and talk to neighbors and other qualified people.

(Testimony of Grant Merrill.)

Q. You have yourself started and brought to production peach orchards, have you not?

A. Oh, yes.

Q. You know the cost and expense of bringing a peach orchard into full production?

A. That is right.

Q. Mr. Merrill, do you have an opinion on—strike that, please. Mr. Merrill, have you been in the Charles Grimm Merrill Gem peach orchard?

A. Yes.

Q. Have you been in that peach orchard prior to March 4, of 1957?      A. Yes.

Q. Have you been in that orchard since March 5th of 1957?      A. Yes. [219]

Q. Mr. Merrill, do you have an opinion on the fair market value of the Charles Grimm peach orchard on March 4, of 1957?

A. Well, it's pretty hard to determine——

The Court: The question calls for a yes or no answer.

The Witness: Oh. What was the question again?

Q. (By Mr. Hamilton): Do you have an opinion on the fair market value of the Charles Grimm peach orchard on March 4, 1957?

A. I have some ideas, yes, sir.

Q. What is that opinion?

The Court: I think I would like to ask the witness some questions.

Mr. Hamilton: Certainly.

The Court: Mr. Merrill, what is your understanding of the term "fair market value"?

(Testimony of Grant Merrill.)

The Witness: Well, it is what I might sell for or others might buy from me, under normal trading conditions, nothing forced about it. That is about what I would call fair market value.

The Court: Well, it is what a willing seller would sell for, and a willing buyer would pay for, in the open market——

The Witness: Yes.

The Court: ——neither acting under any compulsion, and [220] each being fully informed as to all of the uses to which a piece of property has been adapted, or is adaptable. It isn't what you would sell for, what I would sell for; it is what a willing buyer and a willing seller might arrive at through negotiations in the open market. Now, that is, I think, the definition that you should have in mind.

Are you a real estate broker?

The Witness: No, sir.

The Court: Not a salesman?

The Witness: No.

The Court: Have you bought or sold any real property in Kern County?

The Witness: Just bare property without any orchard on.

The Court: Have you kept informed as to the sales of peach orchards in that area?

The Witness: As far as I know there has been none sold in Kern County. There has been some orchards sold in Fresno County I know about.

(Testimony of Grant Merrill.)

The Court: I have no further questions.

Q. (By Mr. Hamilton): Bearing in mind, Mr. Merrill, what Judge Jertberg has told you, would you now, basing your opinion upon that, give us your opinion as to the fair market value of Mr. Grimm's orchard on March 4, 1957?

Mr. Barnard: If the Court please, in view of the [221] witness' answers to your Honor's questions, I would object on the ground a proper foundation has not been laid. The witness has stated that he knows of no sales of orchards in Kern County.

The Court: I think I will have to sustain that objection, Mr. Hamilton, on the ground of lack of foundation.

Mr. Hamilton: Your Honor, on that particular situation, it has been brought forth in evidence that peaches are of comparatively recent vintage in Kern County. The Court would not leave us in a position where it would be impossible by a man of 30 years experience to fix his opinion of a fair market value by reason of the fact there have been no sales, a commodity that in that area is so relatively new that an historical market has not developed. Mr. Merrill has stated that he knows, and has purchased bare land; that he knows the cost of producing an orchard from the root stock stage to full production, and while there may be an absence of sales, it seems to me that we are entitled to have his opinion; that the fact it was not based on any sales in Kern County may go to



(Testimony of Grant Merrill.)

the weight of that, rather than excluding his opinion entirely.

The Court: Well, I believe, Mr. Hamilton, that fair market value means about what the definition says, it is what the market reflects. Now, I agree that if there are no sales from which the market can be determined, that fair [222] market value may be arrived at by other means. But I don't think you have laid the foundation for that.

Q. (By Mr. Hamilton): Mr. Merrill, when was the Merrill Gem peach first observed by you?

A. In 1942 the seedling that later became the Merrill Gem was first observed to fruit.

Q. And when was the Merrill Gem first planted commercially?

A. Well, I planted the first trees myself in 1944.

Q. In 1944. A. February 1944.

Q. Where were those trees planted?

A. In Kern County, on my property I now own.

Q. Now, have you, sir, continued to plant Merrill Gems on any property, additional trees from time to time? A. Yes.

Q. I take it as a matter of mathematics—strike that, if you would. Of your original 1944 planting, Mr. Merrill, are there any left?

A. Yes, some of them.

Q. Then the oldest producing Merrill Gem peach trees would be 14 years old?

A. That is right, this February.

Q. That would be going into, as you would express it, [223] their fifteenth leaf?

(Testimony of Grant Merrill.)

A. That is right.

Q. Do you recall how many acres there were in that original planting?

A. There are about ten acres.

Q. What is the size of your Merrill Gem orchard in Kern County at the present time?

A. Well, this particular farm has 22 acres on it, and the other farm newly planted has ten acres.

The Court: You mean, both in Bakersfield?

The Witness: Both in Kern County.

The Court: Kern County, yes.

Q. (By Mr. Hamilton): By the other farm, you refer to the 150 acres you had on a lease basis?

A. That is right.

Q. Mr. Merrill, from your experience in the peach business, and your observation of the Merrill Gems, what is its productive life span?

A. Well, I think under normal good growing condition I would think the tree would last around 30, 35 years.

Q. When, sir, does a Merrill Gem peach come into maximum production?

A. About the sixth or seventh leaf.

Q. Have you had on many occasions had Merrill Gems [224] planted and brought to bearing through their fifth leaf?      A. Yes.

Q. From your experience what production can be expected from a Merrill Gem, in normal health and vigor, in good condition, in the year of its fifth leaf?

A. Well, it wouldn't be full production yet. I

(Testimony of Grant Merrill.)

would say somewhere between four and eight tons to the acre.

Q. Four and eight tons, or four and eight lugs—excuse me.

A. It would be four and eight tons, 400 to 800 lugs per acre, either one would be approximately correct.

Q. Can you reduce that to production per tree?

A. It would be approximately four to eight lugs per tree.

Q. Four to eight lugs per tree. Sir, in comparison with other varieties, of approximately the same harvest date, is the Merrill Gem a desirable peach on the open market?

A. It has brought the highest price of any peach at any time of the year on an average of a year.

Q. Does it ship well? A. Very well.

Q. In the Bakersfield area, when annually is the average annual harvest date?

A. In Kern County?

Q. Yes. [225]

A. Well, it will start on early seasons in early districts the last week in May, and in later districts and in later years it will run up to the second week in June, starting harvest.

Q. In other words, it is late May and early June? A. That is right.

Q. Mr. Merrill, do you keep records of your Merrill Gem peach production? A. Yes.

(Testimony of Grant Merrill.)

Q. As a matter of fact, those are rather elaborate records, are they not?

A. We keep very careful records.

Q. As a matter of fact, you keep a record in which you can even give the average number of peaches per tree harvested each year, is that correct?

A. That is right.

Q. Did you, Mr. Merrill, at my request go back through your records, and using those Merrill Gem peach trees in Bakersfield that were at the time the figures were taken at maximum production, in other words, in their sixth leaf or over, compile your production records for me?

A. I have to qualify the answer in two ways. My secretary and I both went over the figures, and then we did not compile the figures off only the old trees. We added in the younger trees, and it is my custom to go through [226] the orchard each two or three years and take the trees that are half in bearing, and give them a half score; those that are a quarter bearing, give them a quarter score, and so on, and add that up and determine what the total number of equivalent mature trees these are. We have to do that because we have had severe nemetoid damage in that orchard before we had to change roots, and even some since then, and also it was an experimental orchard, developing these new varieties, and we changed over some of the varieties, starting with ten acres of Gems and we now have 22, we gradually changed them over, so that at various times we had various age

(Testimony of Grant Merrill.)

trees. And for my own information, in order to determine what was the production per tree and make a study of my costs, and so on, we used the proportions of various ages of trees for my own information, to try to determine what our costs were, and production factor, and so on. So it wasn't just the five year olds or older, it was the proportion of mature trees we used.

Q. And are those figures, those proportional factors, put into those records at the time that tree was in production?

A. We went through the records, usually in the wintertime when the tree is most easily observed without leaves and growing conditions, and we usually make it at that time, sometimes in the fall when some of the leaves are still on. [227]

Q. But that factor is put into your records and preserved by you, and was used by you in compiling this historic production for me, is that correct?

A. We compiled it at the time, and put down the figures in our book, and after we compiled it, we didn't keep it any more. In other words, each year, or every other year, or at regular intervals, we get a proportion allowing for growth, and we try to get what we consider as a basis for our own information.

Q. And you and your secretary, you say, both worked on these figures? A. That is correct.

Q. There were some records preserved by you at the Bakersfield office kept at your home office in Red Bluff, is that correct?

(Testimony of Grant Merrill.)

A. The records were kept at Red Bluff.

Q. And such work as your secretary may have done was under your supervision?

A. That is correct.

Q. From records under your control?

A. Right.

The Court: Mr. Hamilton, let me interrupt for a moment.

(Other court matter.)

The Court: All right, I think we can go ahead.

Mr. Hamilton: Thank you, your Honor. [228]

Q. Mr. Merrill, do you have with you a copy or the original of the production records which you delivered to me? A. Yes, I have.

Q. In 1951, sir, how many Merrill Gem peach trees did you have in full production?

Mr. Barnard: Now, if the Court please, may I interpose an objection to the question, and to all questions directed towards this survey, on the ground that the answers given by Mr. Merrill as to how it was prepared show that it was not based on production of a given group of trees of a certain age, but was based on a composite which is dependent entirely on Mr. Merrill's opinion as to whether he gave a tree half credit, a third credit, or full credit, and so on. Therefore, it is not competent evidence of the productivity of a given tree or a given acre.

The Court: Are you talking, Mr. Merrill, about Gem peaches in the Bakersfield, or Kern County area?



(Testimony of Grant Merrill.)

The Witness: That is right, Merrill Gems.

The Court: In Kern County?

The Witness: That is right.

The Court: Now, confine yourself first to 1951, first, Mr. Merrill. Explain again to me exactly how you made this survey with respect to 1951.

The Witness: Well, it happens in the year 1951 there was no survey necessary because in that particular year [229] the trees were all in full bearing that we had records on. Some of the years we had to proportion but not 1951.

The Court: In 1951 you have a survey of the actual production from a given number of Gem peach trees in Kern County, is that right?

The Witness: That is right.

The Court: Well, I am going to overrule the objection as to 1951.

Mr. Hamilton: Thank you, your Honor.

The Court: Read the question, Miss Schulke.

(Question read.)

The Court: I am confining it now to Kern County.

Q. (By Mr. Hamilton): All of the records that you delivered to me were confined exclusively to your orchard in Kern County, south of Bakersfield? A. That is right.

Q. Do you recall the question now, sir?

A. 600 trees.

Q. And what was the number of lugs of peaches produced? A. 2,792.

(Testimony of Grant Merrill.)

Q. What was the average number of lugs per tree produced?      A. 4.6.

Q. What was your f.o.b. selling price in Kern County? [230]

Mr. Barnard: If the Court please, I don't believe the selling price in 1951——

The Court: No, I will sustain the objection with respect to selling price in 1951. I think it is a little too remote, market conditions change; it would depend upon many variable factors. So I will sustain an objection to that question.

Q. (By Mr. Hamilton): In 1952, Mr. Merrill, how many Merrill Gem peach trees in your orchard in Bakersfield did you have in full production?

A. We had 600 in full production, and we estimated another 100 due to young trees coming in.

Q. Now, do you recall how many young trees you had coming into bearing, and their age?

A. I don't have the figures and I don't remember.

Q. Are those figures in your office?

A. Not any more, no.

Q. This production factor that you placed on those younger trees coming into production, that was made for your own purposes, and for your own use in your own records, is that right?

A. That is right. That was made in order that I could determine what it was costing, my average production, count per tree, and other such information, made at the time, [231] at the end of the harvest, or previously; some time during that year.

(Testimony of Grant Merrill.)

Q. It is not made for——

Mr. Barnard: If the Court please, this is going to be a leading question, and I object before he finishes it.

The Court: Well, attorneys are better able to anticipate than the Court. It is hard for me to rule on a question until I know what the question is.

Mr. Barnard: I think Mr. Hamilton will re-frame it.

Q. (By Mr. Hamilton): Mr. Merrill, this production factor you have placed on your younger Merrill Gem peach trees coming into production, if it was substantially erroneous the only person that would have been fooled by it would have been yourself, isn't that correct?

A. That is right.

Q. Did you attempt to fix it as completely accurately as you could? A. Yes.

Q. I am going to again ask the question: In 1952, Mr. Merrill, how many Merrill Gem peach trees did you have in the Bakersfield orchard in full production?

A. We had only 600 in full production.

Q. And of the productive factor of the younger trees, how many additional trees do your records show those [232] younger trees would represent in 1952?

The Court: Well, what do you mean, would represent? You mean would represent in full production?

Mr. Hamilton: Represent in full production?

(Testimony of Grant Merrill.)

A. I estimate the productive capacity of those young trees as equivalent to 100 mature trees.

Q. Making in 1952 a total of 700 trees in full production? A. Equivalent.

Q. And how many lugs in total did you produce in that year from those trees?

Mr. Barnard: To which we object on the same ground, that it is obviously based upon production from 600 trees in full maturity, and then an unknown quantity of other trees, which is completely dependent upon Mr. Merrill's own opinion, or whim, or whatever he did for his own use, and to add those in without all the factors being known makes the answer completely meaningless.

The Court: Mr. Merrill, have you any records of production in 1952 from the 600 trees that were in full production?

The Witness: We did not keep it separately.

The Court: You did not keep it separately.

The Witness: No, sir.

The Court: And how many young trees were there in the [233] survey, where you found an equivalent number of trees in full production?

The Witness: There were approximately 400 young trees at that time, grafted over trees.

The Court: And were they of various ages?

The Witness: Yes, they were of various ages, yes.

The Court: Some were not in their first leaf, and others were second or third, is that right?

The Witness: They were in various ages, yes.

(Testimony of Grant Merrill.)

The Court: I think I am going to sustain an objection to the question. I think we get somewhat into the field of conjecture, and I doubt if it has the factor that should prevail.

Mr. Hamilton: Your Honor, again, I have known of the elements in here since of course my first discussion with Mr. Merrill, about a month ago. We have again a commodity which is relatively new. This is the oldest Merrill Gem peach orchard there is, not only in Kern County but in the world. This is the best set of records that there are available from an historic point of view. The expectable production in the future might be guessed. That is the reason I brought Mr. Merrill here, recognizing the weakness in the situation, and trying to bring out all of those factors. I plead with the Court that if there is some variable in there that may make it not absolutely accurate, [234] and that variable might be brought to the attention of the jury, as it has in this case, the jury could give that such weight as it might believe is fair, and we might get an historic record of reasonable certainty of it.

The Court: Well, as I have indicated, I think those years in which Mr. Merrill has records of production from trees that are in full production, as I have already indicated I think such evidence is admissible.

Q. (By Mr. Hamilton): Let's take, Mr. Merrill, and you have your copies before you, 1954. The copy I have in front of me shows 900 trees. Now, were there 900 trees in full production then?

(Testimony of Grant Merrill.)

A. Those were very close to full production, as close as you ordinarily get in a commercial orchard.

Q. According to your best recollection, was there any substantial number, or how many younger trees not in full production might there have been in that year of 1954?

A. Oh, I think less than ten per cent.

Q. How many lugs of peaches did you pack from that 900 trees?

Mr. Barnard: I make the same objection.

The Court: Well, as I understand it, Mr. Merrill, in 1954, at least 90 per cent of the trees from which you received production were in full production, is that right?

The Witness: I think better than 90 per cent.

The Court: Better than 90 per cent. So your equivalent of trees in full production, based upon the younger trees, related then to less than ten per cent, is that right?

The Witness: That is right.

The Court: Well, I think under such circumstances I will overrule the objection as to 1954.

Mr. Hamilton: Thank you, your Honor.

Q. The question was, how many peaches did you pack in 1954 from the 900 trees?

A. 7,568.

Q. And what was the average number of lugs per tree?

A. 8.5—8.4, I guess it should be.

Q. Mine shows 8.5.



(Testimony of Grant Merrill.)

A. I believe that is a mathematical error; it should be 8.4.

Q. In 1954, sir, what was your sales price?

Mr. Barnard: If the Court please, I object on the——

The Court: I will sustain the objection.

Mr. Hamilton: That is too remote, you feel, your Honor?

The Court: Oh, I think it is too remote, and the price of fruit, at least my experience, has varied from year to year, it depends upon many factors. In some peach areas there may be climatic or other conditions that affect their production, and that reflects itself in the market on areas that haven't met with those factors. So I think I will [236] sustain the objection to that question, and also the four years before the events which we are reviewing here.

Q. (By Mr. Hamilton): Your Merrill Gem peach orchard in Bakersfield, Mr. Merrill, your harvest and packing time is it approximately the same date as Mr. Grimm's harvesting and packing time?

A. I think it is three to five days later.

Mr. Barnard: May I have that read back? The answer.

(Answer read.)

Mr. Barnard: May I ask which you meant?

The Court: Mr. Grimm's peaches, as I understand it, are three to five days earlier than yours?

The Witness: That is right.

(Testimony of Grant Merrill.)

Q. (By Mr. Hamilton): In 1955, Mr. Merrill, what number of Merrill Gem trees did you have in your Bakersfield orchard in full production?

A. We had 900 in full production.

Q. In 1955?

A. Yes. There were that many in full production. There were some others that were in partial production.

Q. Now, you estimated by using your production factor applied to other trees a total of 1200 trees, is that correct? A. Correct.

Q. Then in 1955 there was a substantial number out of [237] the total of 1200 that were not in full production, is that correct?

A. That is right.

Q. Do you have any estimate of how many? Any recollection in your mind?

A. Yes, there were about 1500.

Q. Mr. Merrill, do you have any record of the production in 1955 from the 900 trees that were in full production? A. No.

Q. You have no separate records on that?

A. No.

Q. Moving now, sir, to 1956, how many trees did you have in 1956 in full production?

A. We still had—oh, I would have to estimate that, about 1,000, maybe a little more.

Q. The figure you have given to me, sir, is 1600. A. That is equivalent.

Q. And out of that 1600, how many were—strike that, if you would, Miss Reporter.

(Testimony of Grant Merrill.)

The Court: Well, as I understand, Mr. Merrill's testimony is 1600 is the equivalent, so that means by that that you had more trees than 1600, is that right?

The Witness: That is right.

Q. (By Mr. Hamilton): How many trees that particular year, if you can [238] recall, did you have to place a production factor on?

A. Approximately 1600—no, I correct myself. It is approximately 1500 or 1600, I think it was 1500.

Q. Sir, in 1957, how many Merrill Gem trees did you have in full production?

A. We had about 2,000, full production or very close to it.

Q. The figure that you have given me is 2,027. How many trees did you have to place a production factor on to arrive at a full production figure of 2,2027?

A. Well, there were about 200 that we had to put a production factor on, and about 200 were not bearing at all.

Q. In other words, of the 2,2027, there would be less than ten per cent represented by trees not in full production?      A. About ten per cent.

Q. What total number of lugs of peaches did you harvest from that 2,027 trees?

A. 15,043.

Q. And what was your average lugs per tree?

A. 7.4.

(Testimony of Grant Merrill.)

Q. And what was your f.o.b. price, Mr. Merrill?      A. \$3.80.

Q. Mr. Merrill, what were your total costs in 1957, of picking, packing, and the lug and liner?

Mr. Barnard: Now, if the Court please, the question, as [239] I understand it, would deal with trees which were not in full production where obviously the cost per tree or per lug would be much greater, and therefore object to it on that ground.

The Court: Well, as I understand the testimony of the witness, you had 2,027 trees in full production?

The Witness: Or equivalent.

The Court: Oh, or equivalent. Well, how many trees now did you have in full production in 1957?

The Witness: We had about 1,800 full production.

The Court: 1800. Then you had about 200 that didn't produce at all, that is, they weren't old enough?

The Witness: Yes, sapling.

The Court: Then you didn't apply any factor to those?

The Witness: No.

The Court: Then you had 200 to which you applied a factor?

The Witness: Yes.

The Court: Were they at various ages?

The Witness: Yes, they were—no, they were fairly uniform in size; they were grafted over from

(Testimony of Grant Merrill.)

another variety, and they were relatively uniform in size.

The Court: What year were they in?

The Witness: Well, the original root stock, on the roots on which they had been grafted, were planted, most of them in 1944, and some of them later, and they were [240] grafted over, I can't remember the exact date, but it was the early '50s, and they began to come into production fairly uniformly, and by 1957 what was not in production were fairly uniform in size and getting close to full production.

The Court: Let me ask you this, Mr. Merrill, in the harvesting and packing, harvesting particularly, do you have any records showing the cost as between a tree in full production and a tree that is in less than full production?

The Witness: We don't keep records on that.

The Court: You don't keep records on that.

The Witness: Not on the various age trees, except we have orchards that are younger, and are older, and I haven't got the figures here.

The Court: Well, is it your best judgment that the cost of harvesting of the, say, 200 trees to which you applied the factor was more than the cost of harvesting the peaches on the trees in full production?

The Witness: They were so near full production I don't think it would make any difference.

The Court: All right. I will overrule the objection.

(Testimony of Grant Merrill.)

Q. (By Mr. Hamilton): What was your cost for picking, per lug?

A. It was 35.4 cents per lug.

Q. What was the cost of your packing labor?

A. 31 cents per lug. [241]

Q. What was the cost of loading, and whatever pre-cooling or services the rail cars needed?

A. That was seven cents per lug.

Q. And what was the cost of the lug and liner, the box itself?

A. That is the box, the lids, the pad, cups, all the materials that go into making up the box, came to 48.4 cents.

Q. That is a total, is it not, of \$1.16 per lug.

A. No, the total was \$1.21. I don't know who did that total, the total is wrong.

Q. Mr. Merrill, from your Merrill Gem peach orchard in the Bakersfield area, do you have records which will disclose to you all of your expenses in connection with caring for those orchards?

A. Yes.

Q. You have the records which will disclose to you all of your income——

A. Yes.

Q. ——from the orchard? A. Yes.

Q. You have records from which you can find your net profit per year from that orchard?

A. That is right.

Q. Using your knowledge of that net profit, and using that, sir, as a basis, or one of the bases to assist you in [242] arriving at a value, a fair market value for the Charles Grimm orchard in that



(Testimony of Grant Merrill.)

area on March 4, 1957, would you have an opinion as to its fair market value, taking that net profit factor into consideration? A. Yes.

Q. What is that opinion?

Mr. Barnard: To which we object, if the Court please, on the ground that the witness has not yet been shown to possess the qualifications necessary under the statute test of a willing buyer and a willing seller. The net profit factor may have something to do with it, but it certainly isn't the sole criterion of market value.

The Court: I believe, Mr. Hamilton, that I will have to sustain the objection to the question. The cases seem to hold that net profit is such a variable factor, depends upon management, and depends upon so many other factors that may vary. I think there are cases, if I recollect correctly, holding that net profit is not the proper basis or a basis for estimating fair market value. I will be glad to permit you to review it with me. I think it is the Beacon Lumber Company case, in about 123 Cal. App. that passes on this question. I will withhold ruling until after recess.

Ladies and gentlemen, we are going to have our morning recess now. Bear in mind the admonition the Court has given you. We will take a short recess.

(Short recess.) [243]

The Court: Do counsel note the presence of the jury?

Mr. Barnard: Yes, your Honor.

(Testimony of Grant Merrill.)

Mr. Hamilton: So stipulated, your Honor.

The Court: Mr. Hamilton, the Court will sustain the objection asked the witness concerning net profits from his peach orchard.

Q. (By Mr. Hamilton): Mr. Merrill, in the usual and ordinary course of culture of Merrill Gem peach trees, how many primary or scaffold limbs does each tree ordinarily develop?

A. Well, they vary by grove, from a low of eight to a high of—a low of three, to about eight, very high.

The Court: What is the average, I think was the question.

The Witness: I think probably, maybe six—five.

Q. (By Mr. Hamilton): Now, Mr. Merrill, on what sort of wood, in reference to age, does the fruit, the annual crop of fruit, develop?

A. One-year wood.

Q. And to what is the one-year wood attached?

A. Well, it is attached to the two-year wood.

Q. If a primary or major limb is cut off of a Merrill Gem tree at or near the place where that primary is attached to the trunk, will that tree, assuming it is otherwise in a healthy condition, regrow wood to replace the primary that was cut off? [244]

A. Well, it will grow new wood, yes.

Q. Turning your mind now to the Charles Grimm orchard, and it has been shown that some damage or injury occurred in that orchard in the spring of 1957; it has also been shown that a cer-

(Testimony of Grant Merrill.)

tain number of primary or major limbs were cut off of a substantial number of trees in or about October of 1957, would the new growth that you spoke of commence in 1957, or would it commence in 1958?

A. I don't exactly get the question. You are referring specifically to the Charles Grimm place, I presume?

Q. Yes.

A. In that case, the limbs that I saw that spring were dying. Now, cutting them off in October doesn't have anything to do, not with the growth they made that year. That is why I don't quite get your question, sir.

Q. New growth would start immediately after the old limb died, would it not?

A. Even if it became sick, yes.

Q. So there would be some re-growth in that orchard in 1957?

A. Yes, that is right.

Q. Of wood to replace the wood that was damaged, is that right?

A. Yes.

Q. Would that re-growth of wood produce any fruit in 1958? [245]

A. You mean in the Charles Grimm orchard?

Q. Yes.

A. Not on Gems, I don't think. Gems don't set after rank growth wood of the year before.

Mr. Barnard: What was that answer?

The Witness: Gems do not produce on rank growing wood of the year before.

Q. (By Mr. Hamilton): That new growth would

(Testimony of Grant Merrill.)

of course produce no fruit in 1957?           A. No.

Q. Would there be fruit on that new growth in 1959?           A. Yes, there should be.

Q. What, in your opinion, and from your experience with the Merrill Gems, would be the percentage of the production in 1959, as related to the normal production from that limb which you could have expected if it had remained in a healthy, normal condition on the tree?

A. Well, I don't expect you would have over 20, 25 per cent of full production on that limb.

Q. In 1960, there would be fruit on that re-growth, and on the new wood that came out of it, would there not?

A. Yes, there would be some fruit.

Q. And what percentage of a normal crop would you expect in 1960? [246]

A. Well, I think 40, 45 maybe, not over 50 per cent; probably 45.

Q. And in 1961, what percentage of a normal crop could you expect?

A. Well, I think you would get up pretty close to—the maximum production likely to produce might be 60 per cent, or two-thirds, something like that.

Q. Around 60 per cent?           A. Yes.

Q. The following year, 1962, would it be at the maximum production that that new re-growth of wood could be expected to produce?

A. I think so, if it was all cared for.

Q. Would that be the equivalent to what the

(Testimony of Grant Merrill.)

wood which represents that limb, would your production from that limb be equivalent or equal to the production you could have expected from that limb if it remained on the tree in a normal, healthy condition?

A. No, I don't think it will ever come back to normal.

Q. About how close to normal will it come, in your opinion?

A. Well, on trees of that age, which are relatively young, I think it could come back to probably around 80 per cent.

Q. And for that portion of the tree the production [247] from that area of it would thereafter remain at approximately 80 per cent?

A. I think so, yes.

Q. Mr. Merrill, when you cut a primary or a major limb off of a Merrill Gem tree, does it shorten the life of the tree?

A. Oh, yes, very definitely.

Q. Would you have an opinion, sir, on how much shorter the life of the tree would be, and we are referring to Merrill Gems, if all of the primary, all of the limbs were cut off the tree, by taking into consideration the fact that the trunk and root system apparently remain in a healthy normal condition?

A. Cut them all off?

Q. Cut them all off.

A. Well, sometimes the shock is so great it kills the tree. Ordinarily, if all limbs are cut off, it is a pretty severe shock, and wood rot develops

(Testimony of Grant Merrill.)

down through the heart it is pretty bad. I would say it would cut at least ten years.

Q. If two, or more than two of the primary or the major limbs were cut off, two out of the average of five, how much would it shorten the life of the tree?

A. Oh, probably about half that much, about five years.

Q. Mr. Merrill, in 1957, with special reference to the [248] spring period of 1957, from, say, the first of March, to after harvest time in your Merrill Gem peach orchard in Kern County, was there any bacterial disease of any kind?

A. I didn't observe any.

Q. Throughout the spring of 1957, did your orchard, your Merrill Gem orchard, remain in a normal healthy condition? A. Yes.

Q. Mr. Merrill, do you use in your ordinary spray program oil? A. Yes.

Q. When do you use oil in your spray program?

A. When the trees are dormant, in January and early February.

Q. Do you ever use oil after the trees have broken dormancy, after they show signs of life in the spring? A. No.

Q. Why? A. I think it is dangerous.

Q. What is the danger?

A. Oh, I think you can kill the tree and kill the limbs.

Q. Mr. Merrill, have you ever used an insecti-



(Testimony of Grant Merrill.)

eide or an agricultural chemical sold under the trade name of Mitox?

A. No; not to my knowledge. I had a foreman down there and he generally kept me informed what he put in, but I don't remember he ever said he used Mitox. [249]

Q. From your experience and your use of oil as a regular part of your spray program, is the Merrill Gem peach tree more susceptible, or less susceptible, to oil injury than other varieties of peaches?

A. I believe it is more susceptible.

Mr. Hamilton: You may cross examine.

#### Cross Examination

Q. (By Mr. Barnard): Mr. Merrill, you testified that you grow peaches in the Red Bluff area?

A. Yes.

Q. And also in the Bakersfield area of Kern County?      A. In Kern County.

Q. Is there any difference in those areas?

A. Difference in what respect?

Q. As to the type of peaches which must be grown to be successful?

A. There are some limitations in both areas as to the varieties that will be profitable.

Q. It is true, is it not, that Kern County being somewhat warm has a very mild or very short season of dormancy?

A. No, it has a long season of dormancy.

(Testimony of Grant Merrill.)

Q. Does it have as complete a dormancy as you find in a colder climate? [250]

A. It goes just as completely dormant, yes.

Q. They do? A. Yes.

Q. Has the growing of peaches in the Bakersfield area always been successful?

A. I don't think so.

Q. In other words, at one time or another, some years back they tried to grow peaches there and failed?

A. That is what I was informed.

Q. And now in recent years it is being tried again with new, brand new stock?

A. I think I was the first one to try it.

Q. And that was in 1944?

A. I made the planting then.

Q. So for approximately 14 years there has been a commercial growing of peaches in the Kern County area?

A. There has been some before that, but I mean I have grown in that period, yes.

Q. Now, you testified that in 1944 you planted ten acres of peaches?

A. No, I planted 60 acres of peaches, 10 acres of Gems.

Q. I beg your pardon. Ten acres of Gems.

A. Yes.

Q. And you testified that of that 1944 planting some are left. Can you tell us approximately—first, how many [251] trees would there be in ten acres? A. There would be about 900.

(Testimony of Grant Merrill.)

Q. And how many of those 900 are still in that same orchard?

A. I would estimate about half.

Q. In other words, about 450?

A. That is correct.

Q. What happened to the other 450?

A. They were on roots that was not adapted to nematodes in the soil, and we had to change to another root, to grow them on other varieties of root stock to withstand the nematodes.

Q. And so those trees were pulled?

A. That is right.

Q. And new trees substituted?

A. That is right.

Q. I take it all 450 were probably not pulled at the same year?

A. Yes, most of them were pulled the first or second year, '45 and '46.

Q. '45 and '46. Then the re-plants, are they all still there, or has there been a continual change of trees?

A. No, those re-plants are mostly there; very few replacements.

Q. All right. Now, you say that you have to change [252] roots. What root stock was the original planting on?

A. It was supposed to have been on Chelill.

Q. Was it or wasn't it?

A. We can't tell, you have to take the word of the nurseryman, he said it was on Chelill.

Q. And you changed to what root stock?

(Testimony of Grant Merrill.)

A. To S-37.

Q. Are all of your trees now, except the 450 that still remain, on S-37?

A. That is what we bought them for.

Q. In other words, out of all the trees you testified that you planted up, up to close to a couple of thousand now, that is in Kern County, are all on S-37, except the 450 remaining out of the first planting?

A. Yes.

Q. Now, you stated that there was a variation in area in Kern County, insofar as harvest date is concerned?

A. Yes.

Q. And that variation was all the way from, as I recall your testimony, early May to early June?

A. No. You mean Merrill Gems?

Q. Yes.

A. Late May.

Q. Oh, late May to early June.

A. Yes.

Q. And what would cause the variation?

A. It would be a—it is a—it warms up quicker in some areas than others in the spring; in other words, it is warmer in the spring.

Q. And that is true within the confines of Kern County itself?

A. That is right, yes.

Q. And does that same variation in temperature have any effect on production?

A. Well, it is—not the spring temperature, no. The winter temperatures do.

Q. Do the winter temperatures vary in one part of Kern County to another?

A. I believe they do.

(Testimony of Grant Merrill.)

Q. Would variations in kind and quality of soil have any effect on production?

A. You mean amount of production?

Q. Amount of production, yes, and in all these questions I am referring to Merrill Gem peaches.

A. Yes, the soil would affect production.

Q. All right. Does the soil vary in kind and in type in various parts of Kern County?

A. Yes.

Q. Now, you mentioned producing so many lugs of peaches at various times from your orchard. May I ask what size lug [254] you are referring to?

A. Referring to Los Angeles lug.

Q. And how much does it weigh, approximately?

A. It runs net weight around, in Merrill Gems, from 19 to 21 pounds.

Q. 19 to 21 pounds. Do you know whether or not that is the same lug that Mr. Grimm uses?

A. I have seen him using L.A. lugs, but I haven't seen all that he has used. I presume he uses them.

Q. In other words, you ship your peaches in the same lug as he does, so far as you know?

A. Yes.

Q. Now, in 1951 you testified you had 600 trees in full production?      A. That is right.

Q. And in 1952 you stated that you had 600 trees in full production, and from your formula arrived at another 100 trees?      A. Yes.

(Testimony of Grant Merrill.)

Q. Can you tell us how many trees you had beyond the 600?

A. You mean that had any production at all on them? 1952 you are talking about?

Q. 1952.

A. That is a little bit complicated, because that was [255] the year we grafted some other varieties over to Merrill Gems, and I think that was the year, if I remember right, or '53, and they were just new grafts and would bear nothing, and so there *then be* about 300, I guess, of those in 1952 that were old enough to bear some fruit that were not in full bearing.

Q. In other words, would they be, say, in their fourth or fifth leaf?

A. No, they would be various ages.

Q. Now, what I was driving at, Mr. Merrill, is simply this, that in 1952 you had 600 in full production.

A. Yes.

Q. In 1954 you testified that you had 900 in full production?

A. That is right.

Q. So that in 1952 you must have had 300 trees in at least their fourth or fifth leaf to arrive in '54 at a total of 900.

A. I was talking about tree equivalents. There were 300 trees that had some fruit on them in 1952, but only about the equivalent of 100 trees.

Q. Then in 1954, did you mean that the 900 trees were not in full production, but that was an equivalent?

A. No, by 1954 the original planting of about



(Testimony of Grant Merrill.)

900 trees were essentially in full production. [256]

Q. And that is true, is it, as you go on through the years 1955, 1956 and 1957?

A. Well, as I say, in 1952 we grafted these other varieties over and they do show some production in 1955, and they reached essentially full production in my last year.

Q. You mean in 1957? A. Yes.

Q. Now, I am a little confused about 1957. How many actual trees did you have in full production, not counting your formula or anything else, actual trees?

A. Not counting equivalent, I believe it would be about 1,800 or 1,900.

Q. Between 18 and 19 hundred?

A. Something in there. I couldn't say exactly, it is an estimate.

Q. And how many trees did add to that because of your formula in figuring the number of trees you had in production?

A. I don't understand the question. I don't know what you mean by that. I don't know how to answer.

Q. In figuring your production for the year 1957 you gave a figure of 15,043 lugs?

A. That is right.

Q. How many trees did you figure that came off of?

A. I figured that was an equivalent of 2,000; in fact we used the figure 2,027. [257]

Q. 2,027. I just want to be sure I understand

(Testimony of Grant Merrill.)

you; that was 1,800 trees in full production, plus enough trees in partial production to equal in your opinion 2,027.

Mr. Hamilton: Your Honor, that is a misquotation, probably inadvertent; 1800 to 1900 I believe is what the witness testified.

Mr. Barnard: That is correct.

Q. In other words, all I am asking you, so that I will understand, is that the difference between that 18 or 19 hundred and the 2,027 is made up of a number of trees that you figure——

A. That is right.

Q. ——to be the equivalent of that many?

A. That is right.

Q. Now, was there anything unusual about the year 1957 insofar as price is concerned?

A. I think it averaged a trifle less than it had, including the big year of 1955, not counting the big year of 1955 it was about an average price, but if you included the year 1955 it would be lower than that.

Q. In other words, then, the price in 1957 you considered to be an average price if you eliminate the exceptionally good year of '55?

A. That is right.

Q. Was there anything unusual in the year 1957 cropwise?

A. On my orchard, I think some trees were pruned a little [258] too heavy and we should have gotten a little higher production. Otherwise it was, I think, normal. We should have gotten a little big-

(Testimony of Grant Merrill.)

ger crop if it had been pruned the way I wanted it.

Q. That is a condition existing in your own orchard? A. My orchard.

Q. Was there anything in the weather, or in the amount of rainfall that made 1957 either better or worse than the average year?

A. Well, we had to irrigate more, because it rained less.

Q. Does that have an effect on the production?

A. Not if you irrigate.

Q. If you irrigate plenty then it is normal?

A. That is right.

Q. Now, referring to your estimate as to the percentage of production on new growth, you recall that, Mr. Merrill? A. Yes.

Q. I was a little confused as to the percentages, as to whether the figures you gave were the percentages of what you would expect from the original limb of the age that it would have been, or whether those were percentages of what you would expect from the original limb when in full production?

A. That is the percentage of the limb when it was in full production, yes, on a normal tree. [259]

Q. On a normal tree. In other words, you stated that in 1959, for example, the percentage would be somewhere between 20 and 25 per cent; that would be 20 to 25 per cent of a normal limb in full production? A. That is correct.

Q. And the same with the other percentages?

A. That is correct.

Q. Now, would the fact that one major limb

(Testimony of Grant Merrill.)

had been cut affect the production on the balance of the tree?

A. It might affect total production probably in a little better size on what was left, a small amount, until the tree got up to near normal, to its maximum size, then there would be no particular difference.

Q. In other words, during the period that the secondary or re-growth is taking place, the peaches on the remainder of the tree might be of slightly larger size?      A. I think they would be.

Q. Do peaches of a larger size bring more money on the market?      A. They do.

Q. Are peaches graded by size?

A. Yes. Well, they are not graded, the grower puts the different sizes in different boxes. They are not graded mechanically; the grower grades them by hand.

Q. I see. And a box, in other words, which is filled [260] with larger peaches brings more than a box which is filled with smaller peaches, is that right?      A. That is correct.

Q. Now, this figure that you gave us for the year 1957 of \$3.80 per lug, is that the average price?

A. That was the average price after deducting all the costs of selling and shipper; in other words, the check I got from the man who sold them for me.

Q. Where do you sell your peaches? And by that I mean simply this: do you sell them in Kern

(Testimony of Grant Merrill.)

County to a buyer, or do you ship them to the east to be sold there?

A. Well, in 1957 I sold them different than I ever had before in my life; I sold through one broker, in 1957.

Q. You sold your entire crop to one broker?

A. Well, he handled them on consignment, that is, he sold them to the best advantage as a market handler.

Q. Is that \$3.80 then the average price of what other Merrill Gems were worth, or other Merrill Gem growers received last year?

A. Oh, I think in Kern County they received considerably more, because I am in a later district than the others and theirs brought more money.

Q. You think you got less?

A. Oh, yes, I know I did.

Q. Than the average grower. [260-A]

A. Because I am in a later district than most of them, than all of them, I guess.

Q. Now, you stated that you had no bacterial diseases in 1957. Did you have any other form of disease in your Merrill Gem orchards?

A. No.

Q. As far as you know, you had no fungus?

A. I don't recall seeing any curling leaves——

Q. Or no virus?

A. ——or any ordinary diseases that we have in the orchards on some places.

Q. And as far as your orchard was concerned it appeared perfectly normal to you?

(Testimony of Grant Merrill.)

A. Yes. I don't remember seeing anything, any diseases there.

Q. In the spring of 1957 you saw Mr. Grimm's orchard, of course? A. Yes.

Q. Did you see any other Merrill Gem orchards which were not in a normal condition?

A. You mean in Kern County?

Q. In Kern County?

A. Well, I don't know what you mean by normal condition. Spray damage?

Q. Which was suffering from a disease, or damage or any [262] kind?

A. To include, I had a little spray burn myself on two half trees, or maybe three half trees.

Q. Did you see any other orchards, other than Mr. Grimm's, that were not in normal condition in 1957, regardless of the cause?

A. I don't remember seeing any, no.

Q. Did you see any any place else in the San Joaquin Valley? A. Yes.

Q. Where were they?

A. In Tulare County.

Q. Were those Merrill Gems also?

A. Yes.

Q. Was one orchard involved, or more than one?

A. Only one.

Q. Only one. What was the condition of that orchard—withdraw that. What time of the year did you see it?

A. It was in the spring; I can't remember the month.



(Testimony of Grant Merrill.)

Q. What was its condition as far as visual observation was concerned at the time you saw it?

Mr. Hamilton: Your Honor, I am going to object to anything further on this line of questioning unless some similarity between the two orchards is established. I see no purpose in an isolated orchard without establishing some similarity [263] between that and the Grimm orchard.

The Court: You might find out, Mr. Barnard, how old the orchard was.

Mr. Barnard: May I ask first, your Honor:

Q. Mr. Merrill, was the condition that you saw in the orchard in Tulare County anywhere similar to the condition you saw in Mr. Grimm's orchard, or was it something completely different?

A. No, it was similar, but worse.

Q. Similar but worse. Whose orchard was it?

A. Mr. Cochran, I forget which Cochran it is.

Q. And that was Merrill Gem trees?

A. Yes.

Q. How old were they?

A. I would have to estimate. I believe they were nine or ten years old.

Q. Will you describe the condition which you saw?

A. Well, the limbs were dead or dying, wilted, they had started to come out and the leaves were—had started to come out and died back, there were signs of new growth coming around the bottom, some trees almost entirely, other trees only limbs here and there.

(Testimony of Grant Merrill.)

Q. And was that condition fairly uniform through the entire orchard?

A. Oh, it was spotted here and there. The whole orchard [264] was affected, but it was spotted here and there.

Q. In other words, some trees would have more than others? A. That is right.

Q. Were some trees completely normal?

A. I can't remember any of them that were completely normal. There might have been.

Q. Now, Mr. Merrill, what kind of oil do you use as a dormant spray? I am not necessarily referring to brand.

A. I have never determined. My foreman picks the type of oil to use, and I never inquire, and he follows the recommendation of the people from whom he purchases.

Q. Do you know the amount of oil that he uses in the spray?

A. Well, I believe he uses from three to four gallons per 100, depending on whether he uses a mixable oil or oil emulsion.

Q. And has he on occasion used as high as five per cent?

A. I can't recall, and I don't think he would. I would never have recommended it, and when we have talked about it he has never talked of over four, sometimes less.

Q. As far as you know the maximum uses has been four? A. Yes.

Q. Now, you stated as your opinion that Merrill

(Testimony of Grant Merrill.)

Gem trees were more susceptible to oil injury than other [265] varieties of peaches. Will you tell me upon what you base that opinion?

A. Well, I base it on four bits of evidence. I base it on the Cochran place I just told you about, where I thought that was oil injury, and he had some other varieties in there that didn't seem to be damaged. I base it on the Grimm orchard which I thought was affected by oil, and his other orchards didn't. I was told by my field man, under my employee, located in Selma that the Gems seemed to be more affected, and I was told by the farm adviser in Fresno County, John Quail, that the Merrill Gems seemed to be affected worse.

Q. In other words, this opinion of yours is based on what people have told you, and not on any personal experiments you have conducted?

A. These two cases were observation, and two were told by others.

Q. Do you know what Mr. Cochran had sprayed on his trees?

A. He told me he sprayed oil but didn't say what kind, or anything about it.

Q. Did he tell you what percentage?

A. No, he did not, not that I remember.

Q. Did he tell you when it was sprayed?

A. He told me it was sprayed, as I remember, the last [266] part of January.

Q. Now, just one more question, Mr. Merrill, and that is with regard to the re-growth of primary limbs. Is it your testimony and your opinion that

(Testimony of Grant Merrill.)

that re-growth or that new limb will never reach the full amount of production that the original limb would have reached?      A. That is right.

Q. And this would be true even if the re-growth is 10 to 12 years old?

A. I don't think it would ever come back to normal.

Mr. Barnard: I think that is all.

### Redirect Examination

Q. (By Mr. Hamilton): Mr. Merrill, you sold the Merrill Gem peach tree stock that Charles Grimm used to him, did you not?

A. I am not — yes, I sold those original trees. Yes, I did.

Q. And is it not correct that those trees are on the S-37 root stock?      A. That is right.

Q. Mr. Merrill, would you explain to us this tree equivalent method that you use in bringing a certain number of trees at a given point of production into a bundle which you can say is a certain number of trees in full production? Would you explain just how you do it? [267]

A. Well, I take a book with four columns on it, and I walk down the road, and we have a road every four rows of trees. We look on both sides of the road, and we estimate that a tree is half as big, half the production capacity, or a quarter, or three-quarters, according to its size. And then occasionally, in order to check ourselves, we will count the length of growth on a full bearing tree and see how

(Testimony of Grant Merrill.)

many lengths of new wood there is on the new piece, total new wood, and then we count, let us say, we estimate half and we will count the number of length of fruiting wood on that, and we determine whether or not we are estimating correctly. And if we are off on our estimate, we adjust in accordance with the length of the total footage of fruiting wood on the tree, and we don't do that every tree or very many, but we do it throughout the orchard to keep ourselves in check with how accurate we are.

Q. Therefore, if a tree has in measurement of fruiting wood, that is wood on which fruit will be produced, a measurement of fruiting wood one-half that which exists on a normal tree in full production, then you give it a factor of one-half tree, is that correct? A. That is correct.

Q. Mr. Merrill, there are two different types of oil used in spray programs, are there not?

A. I believe there are several. [268]

Q. And one oil is designed specifically to be used in a dormant spray, or spray on trees in a dormant condition, is that correct?

A. Yes, designed for that purpose.

Q. And there is a different oil that is designed to be used on trees after they have broken dormancy, is that correct?

A. When they are in foliage, yes.

Mr. Hamilton: No further questions.

The Court: Mr. Merrill, you stated you sold the trees in question to Mr. Grimm?

The Witness: That is right.

(Testimony of Grant Merrill.)

The Court: And you originated this Merrill Gem variety?

The Witness: I did.

The Court: Do you hold a patent on it?

The Witness: Yes, I do.

The Court: I see. And do you control the sale of Merrill Gem peach trees?

The Witness: Completely, as far as possible.

The Court: I see. I have no further questions.

#### Recross Examination

Q. (By Mr. Barnard): Just one question. Mr. Merrill, since you testified there were various kinds of oils, one oil is made you testified to be sprayed in the dormant stage. [269] A. That is right.

Q. And other oils are designed to be sprayed on foliage? A. That is right.

Q. The foliage oil is a much lighter oil, isn't it?

A. I have no knowledge about it at all as to its weight. I have heard some explanations about unsulfinated residue but I am not sure I know what that means, so I am afraid I can't go into the chemistry of it.

Q. In other words, once again, it is more or less relying just on your general knowledge of what you may have picked up from your foreman?

A. That is it, general knowledge about different types of spray oil, winter oils and summer oils.

Mr. Barnard: I have nothing further.

The Court: Will Mr. Merrill be needed further?

Mr. Hamilton: Not that I know of, your Honor.



(Testimony of Grant Merrill.)

Mr. Barnard: No, your Honor.

The Court: Mr. Merrill, as far as I am concerned, you are excused.

Members of the jury, we will recess for noon, and we will reconvene at 1:30. Bear in mind the admonition I have heretofore given you.

(Thereupon at 12:03 p.m. a recess was taken until 1:30 p.m. of the same day.) [270]

Afternoon Session, 1:30 p.m.

The Court: The jury is present?

Mr. Barnard: So stipulated, your Honor.

Mr. Hamilton: So stipulated, your Honor. We will call Glen Moody.

#### GLEN A. MOODY

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Glen A. Moody.

The Clerk: Have that seat.

#### Direct Examination

Q. (By Mr. Hamilton): You are Glen Moody, are you not? A. That is right.

Q. Where do you reside, Mr. Moody?

A. In Bakersfield.

Q. What is your business or occupation?

A. I am a farmer and grower and shipper of peaches.

Q. Where is the land located on which you grow peaches?

(Testimony of Glen A. Moody.)

A. About 20 miles south of Bakersfield; in reference to Mr. Grimm's place about three and a half, I think, northwest of Mr. Grimm's property.

Q. How many acres do you have in peaches?

A. 120.

Q. And how many acres do you have in Merrill Gem peaches? A. I believe it is about 18.

Q. Mr. Moody, in 1957 how many Merrill Gem peach trees did you have that were in full production? A. About—1957?

Q. Yes.

A. About ten acres in full production, I think.

Q. Do you recall the number of trees? Let me put it this way, Mr. Moody. May I ask the question, at or near full production?

A. Well, we have 18 acres and about ten acres, let's see, 63 trees to a row, 16 rows, what is that? 1,016 trees, something like that were in full production, and the balance, which would be some 800 odd trees were about two-thirds of full production, something to that effect.

Q. The 800 and some trees you referred to as being two-thirds or better production, what leaf stage, what age? A. Fifth leaf.

Q. They are in the fifth leaf. When does a Merrill Gem in your experience come into full production? A. Probably sixth to seventh year.

Q. Including the trees that you gave, 1,016, that were at maximum production, and including with those the trees that were in the fifth leaf, how many trees did you have? [272]

(Testimony of Glen A. Moody.)

A. I believe there is 1,880 trees, or something pretty close to that.

Q. If I may refresh your recollection, 1,884 trees, is that correct? A. That sounds correct.

Q. Mr. Moody, in 1957, how many lugs of peaches did you produce and sell from those 1884 trees?

A. In 1957 we sold 11,063 boxes of peaches, of Merrill Gem peaches.

Q. What was the f.o.b. Bakersfield price which you received?

A. The net f.o.b. our packing shed was \$4.83 average.

Q. What were the harvest costs, picking, packing, lug and liner?

A. Pretty close to \$1.15 per box.

Q. That is what is known as a Los Angeles lug?

A. L.A. lug, yes.

Q. In your opinion, and in lugs per tree, Mr. Moody, and from your experience, what production could you expect reasonably from Merrill Gem peach trees that were in the fifth leaf?

A. The fifth leaf, oh, we would generally figure five or six boxes per tree.

Q. In the spring of 1957, Mr. Moody, did your Merrill Gem peach orchard show any symptoms of any disease of any kind? [273] A. No.

Q. Did your Merrill Gem orchard appear to remain in a healthy, normal, vigorous condition throughout the summer of 1957?

A. '57? Yes, it was vigorous.

(Testimony of Glen A. Moody.)

Q. Mr. Moody, do you regularly use oil in your spray program?

A. I wouldn't say regularly. We do use oil sometimes.

Q. Have you used oil as a spray on your Merrill Gem peaches in the pink bud stage?

A. This year we used a little oil as a spreader in some copper spray we put on. We didn't use it as an oil spray, but we put one per cent oil in for spreader during the swollen bud stage. As soon as the buds got a little too pink we quit though, but that was only one per cent.

Q. On whose advice was it that you used one per cent?

Mr. Barnard: If the Court please, I object to that——

The Court: I will sustain the objection to the question.

Q. (By Mr. Hamilton): Mr. Moody, did you have any conversation with a Harold Fisher, the manager of Cal-Spray, the Bakersfield office, concerning the amount of oil you should use?

A. When?

Q. In the spring of 1958, before this application of oil which you said was, I believe, in the swollen bud stage? [274]

A. Yes.

Q. And what advice did he give you concerning the use of oil?

A. Well, as I recall, he only suggested that we could use quite a bit of oil, and then when he saw

(Testimony of Glen A. Moody.)

the buds, why, he said, one and a half per cent would probably be enough, so I put on one per cent.

Q. He advised you to use one and a half per cent?

A. He thought we could get by with that.

Q. Did he say anything to you concerning the maximum amount of oil you should use?

A. I think he probably figured that was maximum at that stage.

The Court: I will strike the statement of the witness; it is not responsive; and instruct the jury to disregard it.

Q. (By Mr. Hamilton): What did he say as best you recollect? What did he say in reference to the maximum amount of oil?

The Court: That is if he said anything.

The Witness: Well, we discussed it quite a bit. I was trying to think.

Q. (By Mr. Hamilton): You are not required to use the exact words, but the import of what he said.

A. Well, the problem, we discussed it several times, [275] and as days went by the buds swoll a little more, and we had to revise our estimates of what could be used, and as I recall, when we started spraying he suggested at one time we were going to use two per cent, and then we decided we couldn't do any good with that anyway, and the only thing we could do was use it as a spreader, so we dropped it down to one.

Q. And that is your best recollection?

(Testimony of Glen A. Moody.)

A. Yes. I am sorry I can't give more details than that.

Q. This swollen bud stage you have described, Mr. Moody, is that before any of the buds open?

A. Well, there was pink showing, quite a little pink showing.

Q. It might be described as the pink bud stage?

A. Probably the early pink bud stage, yes.

Q. Why did you stop using the oil before you had finished the full coverage?

A. I just got a little worried, some of the buds were opening, some of the pistils were showing, and I was afraid I would burn them off.

Q. Did you regard the use of oil in that stage as dangerous?      A. I did.

Q. Mr. Moody, have you ever used an agricultural chemical and insecticide, I believe it could be called, that [276] is sold under the trade name of Mitox?      A. Not to my knowledge.

Mr. Hamilton: You may cross examine.

#### Cross Examination

Q. (By Mr. Barnard): Mr. Moody, you testified that the picking, packing and I believe shipping costs of your Merrill Gems averaged \$1.15 a lug?

A. \$1.15 a lug.

Q. Yes. The picking, packing and shipping is not the only expense that goes into raising a crop of Merrill Gem peaches, is it?      A. No.

Q. In 1957 you testified that you had no disease in your Merrill Gem orchard?



(Testimony of Glen A. Moody.)

A. No general disease; we may have had an isolated tree here and there with a problem.

Q. With a what?

A. Oh, there is always a tree now will show up with crown gall, or we had — one little problem, a crop duster airplane flew over and spilled some sort of material out and we had about 10 or 15 trees that were damaged from that. Other than that we had no trouble.

Q. Have you ever had disease in your Merrill Gem orchard?      A. No. [277]

Q. How old are your trees?

A. Well, the oldest ones are ten years.

Q. And the youngest ones?      A. Five.

Q. Now, what was the occasion in 1958, the reason for your spraying?

A. Well, we had a rather heavy infestation of brown mite, and we wanted to kill them in the winter, if we could, so we attempted to spray for that, but because of weather conditions, it rained so often, we couldn't do it quick enough, and we dropped that spray and then ended up by using only a spray for leaf curl at that season, because it was too late to use the regular oil; at least I felt it was. It was in March, and I thought that was too late to use oil. So we just put on the other spray, and now we are trying to kill the mites.

Q. I see. And what kind of oil did you use?

A. Well, it was an oil emulsion, but I—clean-up oil, they called it.

(Testimony of Glen A. Moody.)

Q. Is that a dormant spray oil, that is an oil for dormant spray?

A. I believe that is what it is usually called.

Q. As distinguished from a foliage spray?

A. Yes.

Q. And you sprayed one per cent of that in the early [278] pink bud stage? A. Right.

Q. Did you get any damage at all?

A. Not that I could see.

Q. The reason that you didn't use more than one per cent is because you were afraid you would damage the buds? A. Yes, buds or foliage.

Q. Is that the only reason?

A. We could have injured some of the other foliage with buds swelling there.

Mr. Barnard: I think that is all.

The Court: That is all, Mr. Moody.

Mr. Hamilton: May this witness be excused?

Mr. Barnard: Yes.

The Court: Mr. Moody, you are excused as far as the Court is concerned.

The Witness: Thank you.

(Witness excused.) [279]

Thursday, April 10, 1958, 2:00 p.m.

\* \* \* \* \*

Mr. Hamilton: I will call Ashley Browne.

ASHLEY C. BROWNE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Ashley C. Browne.

The Clerk: Have that seat there.

Direct Examination

Q. (By Mr. Hamilton): You are Ashley C. Browne, are you not?      A. Yes.

Q. And that Browne is spelled with an "e" on the end, B-r-o-w-n-e? Is that correct?

A. Yes.

Q. Where do you reside, Mr. Browne?

A. 5060 Otis Avenue, Tarzana, California.

Q. Mr. Browne, what is your business occupation?

A. I am an entomologist with Rohn-Haas Company, Philadelphia.

The Court: May I inquire, where is Tarzana, California?

The Witness: It is in the San Fernando Valley.

Mr. Hamilton: Tarzana is a small town in——

The Witness: It is a suburb of Los Angeles.

Mr. Hamilton: ——near Los Angeles.

Q. Mr. Browne, where did you take your initial schooling?

A. I attended Stanford University, and then missed two years in World War I; when I returned I went to the University of California at Berkeley, took work there; took work at the University of California at Davis, College of Agriculture, and

(Testimony of Ashley C. Browne.)

received my degree in agriculture from the University of California at Berkeley.

Q. What sort of work did you specialize in during the period of your formal schooling?

A. While I was at Stanford I specialized in botany, entomology, chemistry, engineering; and when I went to Berkeley I took more chemistry, and plant pathology, and horticulture; and at Davis I took field work in those courses, irrigation practices, viticulture. And the idea was to prepare myself with as broad a base as I could get.

Q. After your graduation from Davis, sir, what was your first employment?

A. I was superintendent for the A. M. Standish Ranch at Milpetas, 168 acres of orchard, with some dairy and alfalfa.

Q. And who were you next employed by?

A. I went from there in 1923, '22 or '23, to the California Spray-Chemical Company, and worked for them until [281] about 1929. I went to Sacramento for them, and opened the Sacramento office for California Spray-Chemical Company, and there I had charge of the sales and field work related to the use of California Spray-Chemical Company's products. In 1929 I wrote a manual, a book, for California Spray-Chemical Company, listing the chemicals the company used,—the chemicals the company manufactured and their use.

Q. This book was a handbook, was it not, designed for use by Cal-Spray employees?

A. That is right.

(Testimony of Ashley C. Browne.)

Q. It was published in due course by the California Spray-Chemical Company?

A. That handbook was published by the California Spray-Chemical Company, and I believe it carries the imprint date of 1929.

Q. After leaving the employ of Cal-Spray, what did you do, Mr. Browne?

A. I left California Spray-Chemical Company to join the State Department of Agriculture as associate state entomologist.

Q. Was that the State Department of Agriculture of California? A. That is right.

Q. And how long were you with the State Department of Agriculture? [282]

A. I was with the State Department of Agriculture until about mid summer of 1933.

Q. Who were you then employed by?

A. United States Forest Service.

Q. In what capacity?

A. As entomologist in forest entomology.

Q. How long were you with the United States Forest Service? A. Until 1936.

Q. Whom did you then go to work for?

A. I went to the University of Hawaii as entomologist and specialist in vegetable production.

Q. And how long were you with the University of Hawaii?

A. I was with the University of Hawaii from September 1936 until May of 1943.

Q. And then whom did you go to work for?

A. I left the University of Hawaii to go to the

(Testimony of Ashley C. Browne.)

South Pacific for the Board of Economic—Foreign Economic Administration, which was one of the special offices created by the President during the war, World War II.

Q. And what was the purpose of that?

A. The purpose——

Q. What work did you do?

A. The purpose of that project was to produce fresh vegetables for the armed forces ashore to supplement the rations. [283]

Q. In a general way, in what general area did you work in that capacity, and generally what did you do?

A. While I was in the South Pacific I ran farms, running from 50 to 60 acres up to 2,300 acres.

Q. Located where?

A. In the Fiji, New Caledonia, Guadalcanal, Bougainville, Guam, Saipan, and Pelew.

Q. And how long were you with the Foreign Economic Administration?

A. I was with the Foreign Economic Administration until the close of the war, I believe that was in August of 1945, wasn't it? 1945.

Q. And whom were you next employed by?

A. Within a matter of days after arriving back in San Francisco I was employed by Rohn-Haas Company, to work in the agriculture chemical section in the San Francisco—in the westerly area of that company's operation.

Q. I take it from what you say that the Rohn-



(Testimony of Ashley C. Browne.)

Haas Company is a company manufacturing or operating in the field of agricultural chemicals?

A. The field of agricultural chemicals is one of many in which the company is engaged. I am only engaged in the agricultural section.

Q. As an employee of Rohn-Haas, what is your specialty? What do you generally do? [284]

A. My work entails field testing of new compounds as they are brought out, testing them for their own value in the control of insects and diseases, and of comparing those materials with competitive products, and third, of supervising and checking on the use and performance of established chemicals which the company manufactures and has released for general sale.

Q. In the spring and summer of 1957, Mr. Browne, did you conduct any experiments on the Charles W. Grimm ranch south of Bakersfield?

A. Yes.

Q. What were the nature of those experiments?

A. I was testing some new compounds on grapes and also testing some compounds on nectarine trees.

Q. How often during the spring and summer of 1957 would you visit the Grimm ranch for the purpose of conducting your experiments there?

A. I was on the Grimm ranch, first to see Mr. Grimm about securing his consent, oh, I think it was probably early in March. Then I was on there from about the middle of March to the middle of October when I concluded my observations on the

(Testimony of Ashley C. Browne.)

ranch of the grapes. I was on there at intervals of about ten days to two weeks.

Q. In the course of your work, Mr. Browne, have you ever conducted any experiments or tests in which the insecticide Mitox was one of the products being tested? [285]

A. No, sir, I have not.

Q. You are familiar with Mitox, are you not?

A. Only having seen a package and the label.

Q. The only familiarity you have with it then is what you discovered from the label, is that correct?

A. That is right.

Q. Mr. Browne, during the spring and summer, and commencing in March of 1957, were you in the Charles W. Grimm peach orchard at any time?

A. Yes, sir.

Q. Do you recall the first time that you examined the Charles W. Grimm peach orchard?

A. I recall very vividly going into the orchard on the morning of March 18th, with Mr. Grimm, to look at his Merrill Gem peaches.

Q. What did you observe?

A. Peach trees in that Merrill Gem group were strikingly different in appearance from the two varieties on either side, and I was curious to know what Mr. Grimm had applied, or what he had done.

Q. Did you discuss with Mr. Grimm what he had done?

A. I did.

Q. Did he tell you what his spray program had been?

A. He did.

Q. On that particular March 18th, did you make

(Testimony of Ashley C. Browne.)

any [286] extensive examination of the trees, foliage, roots, limbs, or any particular part of the orchard?      A. Yes, sir.

Q. What did you do, Mr. Browne?

A. Mr. Grimm and I took a shovel and we started in at one end of the Merrill Gems, and as we went through we dug soil to see what the roots looked like. We cut bark in the roots, cut bark on the stems, we cut bark on small limbs, and on twigs. We examined the buds, and by buds I mean both the fruit buds, the little blossom buds, and the wood buds, twig buds that were just beginning to develop, and in some cases had come out a little bit.

Q. What, if any, abnormal condition did you discover?

A. In the roots we found no indication of anything abnormal. In the trunks, and on the major limbs and up to the one year old wood we found a very marked discoloration, sometimes in the cambium layer. We found the outer bark was dark, abnormally dark. In cutting into the cambium we found the areas which should have been flesh clean, light green color, or pearly white, were dark brown and necrotic, highly abnormal, looked as if they had been scalded by some type of spray, or some serious injury.

Q. Did you notice any other abnormality?

A. The buds, the fruit buds and twig buds were in many cases shriveled, or they were cracked; they were discolored [287] dark in color. They lacked the fresh flush of opening buds. They looked almost as

(Testimony of Ashley C. Browne.)

though they had been treated with a dose of hot water, or with an herbicide.

Q. Did you on your next visit to the Grimm ranch, approximately ten days or two weeks later, again examine Mr. Grimm's Merrill Gem peach orchard?      A. Yes, sir.

Q. And was the type of examination which you conducted on the second visit approximately two weeks after March 18th about the same as the one that you have described?

A. Yes, very similar.

Q. Did you continue throughout the summer to observe that Merrill Gem peach orchard each time you were on the Grimm ranch?

A. I don't recall a time when I was on there attending to my own work that I didn't before leaving the ranch walk through at least a portion of the Merrill Gems to see what changes, if any, had occurred. It was extremely interesting and I was anxious to see what was taking place.

Q. In these examinations, Mr. Browne, did you detect any sour odor or smell?

A. No, there was neither a sour odor nor was there any accompanying taste to the wood, the bark, other than what would be in ordinary peach wood. It was simply there.

The Reporter: Did you say "it was simply there"? [288]

The Witness: May I ask the last sentence be stricken, it was an incomplete sentence?

(Testimony of Ashley C. Browne.)

Mr. Hamilton: Keep your voice up, Mr. Browne, so everyone can hear you.

The Court: Let's find out and be sure what is being stricken. Read the entire answer, and we will pinpoint it. Read it, Miss Schulke.

(Answer read.)

The Court: You want to strike out "it was simply there"?

The Witness: If you please.

The Court: The statement of the witness "it was simply there" as part of the answer will be stricken and the jury instructed to disregard it.

Mr. Hamilton: Mr. Browne, you understand we are not trying to establish any great literary effort. We want to get at the meat of what you saw before the jury and as rapidly as possible.

Q. Did you see in your inspection — and I am talking now of all of your inspections of the Grimm Merrill Gem peach orchard—any oozing of gum, or gumming of the limbs or branches of those trees?

A. I looked for that characteristic but did not find it at any time during the summer.

Q. Did you see in that orchard the characteristic or symptoms of any disease which you had studied or observed? [289]

A. I did not.

Q. Did you, sir, notice any pattern of damage?

A. There was no regular pattern of damage.

Q. Was there any significant amount of injury to one side of the trees as opposed to the other side?

A. Yes, there was.

Q. And what was that pattern?

(Testimony of Ashley C. Browne.)

A. The pattern of damage to the trees was apparently more severe on the west and southwest than on the other side of the trees.

Q. You say the west and the southwest?

A. Yes, south, west and southwest.

Q. And did you mean south and southwest?

Mr. Barnard: I will object to counsel asking him what he meant.

The Court: I think I will sustain the objection. Read the answer.

(Answer read.)

The Court: You stated south, west and southwest; are you talking about three directions?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Hamilton): Mr. Browne, was there any pattern in reference to ages of wood which you discovered? [290]      A. Yes, sir.

Q. And what was that pattern?

A. The one-year wood was apparently not injured, or if injured to a very, very slight degree. It was the bark covered wood that had beneath it the dark cambium layer, discolored cambium layer.

Q. In your wide and varied experience, sir, had you observed any other stone fruit orchards which showed symptoms that were similar to those you observed in the Grimm orchard?

A. Yes, sir, I recall seeing an orchard in Santa Clara one time, that is Santa Clara County, one time where an oil had been applied rather late in the year and the prunes on which it was used



(Testimony of Ashley C. Browne.)

showed a similar discoloration of the cambium tissue.

Q. Mr. Browne, do you recall the chemical composition of Mitox?

A. I am sorry to say that is a formula that I don't remember, two compounds, both of which are sulfides, but I don't recall their—one was phenol and one was a—I am sorry, I can't go further than that.

Q. But you are aware that it was sulfides?

A. Yes, sir.

Q. Mr. Browne, is there any inherent danger in using foliage spray oils in conjunction or together with the use of sulphur base insecticides? [291]

A. When oils are prepared for use on foliage, they are made safe by the removal of fractions containing sulphur or which have an affinity for sulphur, and the safety of the oil is in direct proportion to the completeness of the removal of sulphur compounds or sulphur fractions, or the components which have an affinity for sulphur.

Q. Now, if a foliage spray oil is used in combination with sulphur based insecticide, what occurs?

A. Such a combination would result in a re-contamination of the oil to a condition approximating the original untreated base stock.

Q. Would that re-contaminated oil have a toxic or burning effect on foliage and wood?

A. Yes, it does.

Q. Mr. Browne, from your investigation and examination of the Charles Grimm Merrill Gem

(Testimony of Ashley C. Browne.)

peach orchard, and your knowledge of the spray program which he used and the ingredients in that spray, do you have an opinion as to what caused the injury or damage to the Grimm peach orchard? Now, that question can be answered yes or no.

A. Yes.

Q. And what is that opinion?

A. I came to the conclusion that the injury on the Merrill Gem peaches was the result of applying a petroleum oil, which may have been or which was contaminated with sulfides or [292] compounds or sulphur to a degree which no longer made it safe, and I am further convinced that was the case because of the presence in the orchard of 18 other Merrill Gem trees which received no oil whatsoever and which also remain—which do remain in perfectly good condition.

Q. Now, these 18 trees that you refer to, are they in the orchard, or adjacent to it?

A. They are adjacent to it.

Q. Mr. Browne, are you familiar with the magazine called the Western Fruit Grower?

A. Yes, sir.

Q. Is that magazine a respected magazine amongst those engaged in the business of raising and selling fruit? Did you hear me?

A. Will you ask the question again?

Mr. Hamilton: Will you read the question, please?

(Question read.)

A. It is.

(Testimony of Ashley C. Browne.)

Q. Have you had an opportunity to examine the compatability table in the latest issue of the Western Fruit Grower?      A. Yes, sir.

Q. According to that compatability table,—what does the word “compatability” mean?

A. In horticultural practice it is taken to mean the [293] compounds may be used safely together.

Q. According to that compatability table, does it indicate that foliage oils, as distinguished from dormant oils, are compatible with Mitox?

Mr. Barnard: To which we object on the ground it is not the best evidence; and secondarily the author of the table would be better evidence than the table itself.

The Court: I am going to sustain the objection to the question.

Mr. Barnard: (Examining document shown by counsel) May I have a minute to look at this, your Honor?

Mr. Hamilton: Would you mark this for identification, sir?

The Clerk: Just this one page?

Mr. Hamilton: You can mark the whole thing.

The Clerk: No. 12.

Q. (By Mr. Hamilton): Mr. Browne, I show you a magazine which indicates on its face that it is the February 1958 issue of the Western Fruit Grower, and on the first page it has the notation “in this issue the 1958 spray compatability chart” and on pages 28 and 29 appears to be a compatabil-

(Testimony of Ashley C. Browne.)

ity chart. Is that the compatability chart that you referred to?      A. Yes.

Q. Does that chart indicate that Mitox is compatible in [294] use with dormant spray oil?

The Court: I think, Mr. Hamilton, that the question is not a proper question. We have an expert witness. The expert, of course, may base his ultimate opinion on his own study, his own education, his own research, his own reading in the field, but I don't know of an instance where an article, we will say, in a magazine or a journal which is recognized by the profession is admissible. Now, this is true, that when an expert in his examination states that he has in part at least based his opinion upon a statement appearing in a standard work or in an article by a recognized expert in the field, and if it can be shown that the statement doesn't support his opinion, then of course you can introduce the book or document or paper, but unless counsel wants to educate me more on this subject, I don't think that the magazine is admissible.

Mr. Hamilton: Very well, your Honor, I believe you are fully correct in that regard. I will withdraw the offer of the Western Fruit Grower. It has, however, been marked for identification.

The Court: Do you care to withdraw it?

Mr. Hamilton: I will withdraw it.

The Court: Do you have any objection, Mr. Barnard?

Mr. Barnard: I may want to use it.

The Court: All right. Well, we will leave it

(Testimony of Ashley C. Browne.)

marked [295] for the time being. Do you have any objection to the document in evidence?

Mr. Barnard: Yes, I do, your Honor.

The Court: All right. Let's move along here.

Mr. Hamilton: You may cross examine.

### Cross Examination

Q. (By Mr. Barnard): Mr. Browne, you stated that it was your opinion that it would be dangerous to use a combination of oil and a sulphur bearing or a sulphur base material on foliage, because the presence of sulphur would remove the safety of the oil, is that correct?

A. Did you say remove, or reduce?

Q. I believe you stated it would be reduced proportionately to the amount of sulphur, is that your statement? A. Would you repeat that?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Yes, sir.

Q. (By Mr. Barnard): Would that be true regardless of what trees you were going to put that spray on?

A. I believe it would, and particularly in relation to the stage of development or condition, physical condition of the trees at the time of the application. [296]

Q. And what condition would be the worst?

A. I think probably the greatest period of danger to the trees is that time when the cell division is going on at a terrific rate of speed and the buds

(Testimony of Ashley C. Browne.)

are breaking, the tissue is extremely tender at that time.

Q. And would it be true that the more pronounced the breaking of the buds was the greater the danger would be?

A. I think that is correct.

Q. Did you examine Mr. Grimm's Blazing Gold trees at any time during 1957? A. Yes, I did.

Q. Did you see any indication of any similar condition in the Blazing Gold that you saw in the Merrill Gems? A. I did not.

Q. Did you examine the Gold Dust trees?

A. Yes, sir.

Q. And did you find any condition existing there? A. No, sir.

Q. Did you know that the Blazing Gold and the Gold Dust trees had been sprayed with the same compound? A. Mr. Grimm had told me.

Q. Now, it is true, is it not, that what you are referring to when you refer to the removing of the safety of a foliage oil, that you are referring to the addition of what is called elemental sulphur?

A. Not strictly. Elemental sulphur may be one of the factors, but sulphur in other forms may also be a contaminating factor.

Q. Is it your testimony that the sulphur in the form of a compound, as is found in Mitox, which you stated—I beg your pardon, you stated you were not familiar with the formula, did you not?

A. That is right. I couldn't remember the chemical names of the two T compounds.



(Testimony of Ashley C. Browne.)

Q. It is true that in some of those chemical compounds the sulphur loses its characteristics, as such? A. Repeat that, please.

Mr. Barnard: Read the question.

(Question read.)

A. It is.

Q. And so the addition of such a compound to oil would not increase the danger, would it?

A. Oh, I think quite the opposite, if I understand you correctly. Sulphur, or compounds containing sulphur, may recontaminate the unsulfinated fractions in the base oil.

Q. If the compound still retains the characteristic of sulphur, that would be true, is that right?

A. No. A compound containing sulphur, or sulphur combined with other elements, may release the sulphur to the unsatisfied hydrocarbons in the oil.

Q. What is lime sulphur?

A. Lime sulphur is a commonly used fungicide, and sometimes insecticide, based on the combination of sulphur and lime prepared under specific processes.

Q. Have you ever used or recommended the use of a combination of lime and sulphur in cleanup or dormant oil? A. I have not.

Q. You have never done that? All right, now let me ask you one question: You were experimenting in Mr. Grimm's grapes in 1957, is that correct?

A. Yes, sir.

Q. You didn't prior to March 5th or 6th experiment with the Merrill Gem peach trees, did you?

(Testimony of Ashley C. Browne.)

A. No, sir.

Q. Now, have you ever experimented with an oil, that is a light summer oil foliage spray, in an attempt to saturate a peach tree and obtain a killing of the limbs?

A. I have never deliberately done that.

Q. You have not?           A. No, sir.

Q. Have you ever experimented with the application of a light or a medium oil upon one year old wood on peach trees and attempted to obtain a saturation?           A. I have not.

Q. Sufficient to kill, was the rest of my question. [299]           A. I have not.

Q. It is true, is it not, that the one year old wood is more tender than the older wood?

A. That is right. Wait a minute. May I correct that? That is one year old wood is more tender than the older wood?

Q. That is correct.

A. What do you mean by tender?

Q. May I say, more apt to be injured?

A. I don't think I can agree to that.

Q. Well, is it your opinion that it is less apt to be injured?

A. The one year old wood is covered with a wax. It has a glaucous covering, which is a very definite protection. One of the reasons we use splinters in many of the compounds put on peach trees is to get a spreading effect of the insecticide over the glaucous area.

(Testimony of Ashley C. Browne.)

Q. So that it is your opinion that it is more protected than the older wood?

A. It is probably more protected.

Q. Now, in examining the Grimm orchard, you stated that you found neither a sour odor nor a sour taste?

A. That is correct.

Q. Is that true for the entire period that you were there, from early March until October?

A. That would hold, that statement would hold until [300] mid summer, when any evidence of fungus disease working in there should have disappeared due to the drying, desiccating atmosphere and the high temperature.

Q. Did you after mid summer notice a sour smell or sour taste?

A. At the time Mr. Grimm was removing the limbs which had died during the summer, I noticed the characteristic odor of fermenting sap, which occurs in any wood that is cut and split and prepared for drying.

Q. During the course of your spring and summer on the Grimm ranch, and your examination of the peach orchard, did you conduct any laboratory tests?

A. No, I did not.

Q. Or any tests of that nature?

A. No laboratory tests.

Q. To attempt to determine the cause of the condition?

A. On Mr. Grimm's Merrill Gems?

Q. Yes. A. I did not.

Q. Now, you stated that you saw in the Santa

(Testimony of Ashley C. Browne.)

Clara Valley an orchard of prunes that showed a similar condition. Do you know what oil had been sprayed upon those prunes?

A. As I recall it was cleanup oil quite late in the year. In other words, the buds were about advanced to the point Mr. Grimm's had advanced, growth had actually started. [300]

Q. And by cleanup oil, you mean a comparatively heavy oil manufactured for use on dormant trees?

A. I am sorry, sir, I can't give you the specific gravity of that oil. It was a long time ago, and I don't remember the gravity of the oil. I recall the symptoms that I saw.

Q. It is considered a dormant oil?

A. I believe cleanup oil is considered a dormant oil.

Q. Do you know the percentage of oil that has been applied to those trees?

A. The last part of that question?

Q. The percentage of oil that had been applied to the trees, the prune trees?

A. Again, that was a very long time ago and I can't remember the percentage of oil.

The Court: How long ago was this, Mr. Browne?

The Witness: That was in 1928, about 30 years.

Q. (By Mr. Barnard): Had you seen the orchard sprayed yourself, or were you merely observing the results after someone else told you the condition?

A. About which orchard?

(Testimony of Ashley C. Browne.)

The Court: It is a compound question. I will sustain an objection to it.

Q. (By Mr. Barnard): Referring now to the prune orchard, had you seen it [302] sprayed?

A. I don't recall that I had.

Q. And your knowledge of when it was sprayed and what was sprayed on it is the result of what other people told you?

A. I remember seeing the barrels there in the orchard at the time I went in, but again it is a long time ago and I can't recall the details of the weight of oil, and so forth, percentage used. I do remember the similarity of the cambium symptoms.

Mr. Barnard: May I have just one moment?

That is all.

Mr. Hamilton: I have no questions.

The Court: Will you need Mr. Browne any further?

Mr. Barnard: No.

Mr. Hamilton: No.

The Court: You are excused as far as the Court is concerned.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamilton: Your Honor, the plaintiff, except for the right of rebuttal, rests.

The Court: Very well. I think we will take our afternoon recess at this time.

(Admonition to jury, and short recess taken.)

The Court: The jury is present?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Members of the jury, the plaintiff has completed his main case. Now the procedure is that the defendant presents its case. All right, Mr. Barnard.

Mr. Barnard: If the Court please, I would like to call as my first witness, Mr. Hornkohl, who was here the other day, slightly out of order, and he could then leave. Mr. Hornkohl.

### FRANK HORNKOHL

called as a witness by defendant, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Barnard): Mr. Hornkohl, you were sworn the other day, when you were on the stand for a few moments? A. Yes.

Q. And you testified that your name was Frank Hornkohl? A. Yes.

Q. And you are a civil engineer, chemist—chemical engineer, and operate a laboratory in Bakersfield? A. Yes.

Q. In the spring of 1957, you were employed by the California Spray-Chemical Corporation, to make a survey of [304] Mr. Grimm's orchard, is that correct?

A. Not in the spring; it was in August.

Q. In August of 1957, and by whom were you employed?

A. By the manager of the Bakersfield office, manager of the California Spray-Chemical.



(Testimony of Frank Hornkohl.)

Q. Who is that? A. Mr. Fisher.

Q. Mr. Hal Fisher? A. Yes.

Q. What did Mr. Fisher ask you to do?

A. He asked me to go out to Mr. Grimm's ranch, and see if I could make a survey of the damage that was done out there, because it was impossible for his own company to get people on the property, and this way it would be a disinterested report. So I went out to see Mr. Grimm and asked his permission, and at that time I made a preliminary investigation of about the first three rows, and then I reported to Mr. Fisher, and they then asked me to come up to Fresno and look at two or three other orchards where somewhat similar damage had been done, and from that point I went back to Bakersfield and made a complete survey of the entire ten acres of the Merrill Gems, and also an examination of the ten acres of the Blazing Gold and the Gold Dust trees.

Q. Now, Mr. Hornkohl, you made a tree by tree survey [305] of the orchard, did you not?

A. I did, sir.

Q. And then you made a row by row summary?

A. Yes.

Q. And then finally a summary of the entire orchard? A. That is right.

Q. Is that correct? A. Yes.

Q. Now, have you had an opportunity to examine Plaintiff's Exhibit No. 1, which is a summary which was prepared by Mr. Grimm?

A. I have.

(Testimony of Frank Hornkohl.)

Q. And how does the summary which you compiled compare with the summary that is contained on Plaintiff's Exhibit No. 1?

A. Well, I would have it just a little bit different than Mr. Grimm. My first list—the number of trees showing only mite damage, but otherwise fairly healthy, with no dead limbs, is my first category.

Q. How many trees were in that category?

A. I found 396. My second category were the number of trees showing very sparse leaf foliage because of extensive almond mite damage but with no dead limbs, and I found 79.

Then my next—I didn't columnize them—but the total is shown in my report, I just show the number of trees showing dead limb, and I had 207 as compared with Mr. Grimm's of 269. [306] However, if I add the items in No. 2 and this No. 3, that would come to about 286, so it compares very favorably.

Q. May I interrupt just a moment? In other words, if you add the trees which you have specified as being of sparse leaf foliage due to mites——

A. Yes.

Q. ——and those trees upon which you found dead limbs——

A. Yes.

Q. ——those are the trees you meant?

A. Yes.

Q. All right.

A. My next group were the number of dead trees. These also include the ones that have new

(Testimony of Frank Hornkohl.)

shoots from the trunk of the tree proper, and I showed 24 as compared with Mr. Grimm's 22. Then my last item was the number of stunted trees, that is they were shorter than the average trees in the orchard by at least four feet or more, and I counted nine of those.

Q. Nine? A. Yes.

Q. That is your final category? A. Yes.

Q. Of your last category, the nine trees which were four feet or more shorter than the rest, was there any external evidence of any reason for that shortness? [307]

A. Nothing except quite a bit of mite damage, as I recall.

Q. All right, now. You were out there on what day, Mr. Hornkohl?

A. Well, my first—my preliminary examination was made on the 6th of August, and then the tree by tree examination, I believe, started on the 16th of August, and that took three days.

Q. And at that time no dead limbs had been cut from the tree? A. No.

Q. They were all present as far as you could see? A. Yes.

Q. Was it possible for you at that time to determine or to reach a conclusion as to the cause of the condition of the orchard?

A. No, sir, because there was too much time had elapsed from the time that I made my original examination. The only thing I noticed of any consequence was the fact that the dead limbs, about

(Testimony of Frank Hornkohl.)

93 per cent of them, were on the south side. That is the only common thing I found. I did find that the almond mite damage was comparable on all three types of trees; in other words, the leaf drop was about the same. Other than that, why, I couldn't come to any conclusion whether it was a chemical damage or a damage due to disease, or what [308] it might have been.

Q. I take it from part of your last answer that you also examined the Blazing Gold and the Gold Dust trees? A. Yes.

Q. Did you find anything other than the mite damage you have just mentioned on those trees?

A. Other than just a few small twigs were broken, which perhaps—I mean I qualified my report, probably by use of some truck or spray rig that might have knocked them off. There was no damage, no dead limbs at all in the five acres of Blazing Gold or the five acres of Gold Dust.

Mr. Barnard: You may cross examine.

#### Cross Examination

Q. (By Mr. Hamilton): Mr. Hornkohl, you gave a list of 396 mite damaged trees?

A. 396 as the number of trees showing mite damage, but otherwise fairly healthy, with no dead limbs.

Q. Now, were those all in the Merrill Gems?

A. Yes.

Q. There are no Blazing Gold——

(Testimony of Frank Hornkohl.)

A. This whole compilation is just on the Merrill Gems.

Q. The compilation then as you gave it by numbers——      A. Yes.

Q. ——79 showing almond mite damage? [309]

A. But no dead limbs.

Q. And 207 dead limbs?      A. Yes.

Q. And 24 dead trees?      A. Yes, sir.

Q. Nine stunted trees?      A. Yes.

Q. Those are all Merrill Gems, are they?

A. All Merrill Gems, yes.

Q. When you were there, Mr. Hornkohl, had the orchard been recently sprayed with some chemical to control mites?      A. Yes.

Q. I believe in your report you stated that the mite situation was then under control?

A. That is right.

Q. Mr. Hornkohl, I believe you stated in your report that the Merrill Gem is more sensitive to oil and chemical attacks than some other varieties?

A. Yes, I was told that.

Q. You made that statement?      A. Yes.

Q. Is it not correct, sir, that the pattern of damage to the southerly exposure of the trees, and I believe you said 93 per cent of the dead material you found was on the south side? [310]

A. Yes.

Q. Doesn't that indicate to you that it was a chemical injury?

A. Well, not necessarily. It could have been a chemical, it could have been any one of a number

(Testimony of Frank Hornkohl.)

of things, but that was the characteristic thing I found at the time, that the damage was, the major part of the damage was on the south side of the trees.

Q. And did you not report to your employer that this strongly indicates a chemical attack of some kind? A. It could have.

Q. You did in fact made that report?

A. I believe I did. Let me check.

Q. Check page 27 of your report, sir.

A. I said it would strongly indicate.

Q. A chemical attack of some kind?

A. Yes.

Q. Did you find any sour odor or smell present? A. No, sir.

Q. Did you find any evidence of gumming or oozing of bacterial matter of any kind?

A. No, sir.

Q. So far as you were concerned, and in your report to your employer, you eliminated the presence of bacterial canker? [311] A. Yes.

Q. You, sir, recommended to your employer that they settle with Mr. Grimm, did you not?

Mr. Barnard: Now, if the Court please, I object to that.

The Court: Yes, I will sustain the objection to that question.

Mr. Barnard: In addition, I would ask the Court to instruct the jury to disregard Mr. Hamilton's remark, or the question.

The Court: Of course, at the proper time, and



(Testimony of Frank Hornkohl.)

I guess the jury already understands it, I will instruct you, but if I sustain an objection to a question, why, you must of course not consider it at all, or speculate as to the answer that might have been given if I had overruled the objection, and base your verdict, of course, entirely upon the evidence which is received and permitted to come before you.

I will instruct you further on that general subject later.

Q. (By Mr. Hamilton): Mr. Hornkohl, the fact that on March 4, 1957, and prior to that time the Charles Grimm Merrill Gem peach orchard was in good or excellent condition, and the fact that on March 5th and 6th it was sprayed with an insecticide mixture, and that at approximately ten days after the spraying evidence of some serious damage or injury was present in that orchard, had substantial significance to you, did it not? [312]

The Court: Well, I think, Mr. Hamilton, those are matters that are properly arguable before a jury at the proper time. I doubt seriously that they are proper questions.

Mr. Hamilton: It was related, your Honor, specifically to portions of Mr. Hornkohl's report.

Q. I ask you, Mr. Hornkohl, what that progression of events and conditions indicated to you?

A. Well, it is definitely a coincidence. However, I didn't make my examination until August, I hadn't seen the property at the time this was

(Testimony of Frank Hornkohl.)

done, so all I could do would be to speculate, Mr. Hamilton.

Q. But what did it indicate to you?

Mr. Barnard: If the Court please, I object to——

The Court: I will sustain the objection to the question.

Mr. Hamilton: I have no further questions.

The Court: Do you have questions, Mr. Barnard?

Mr. Barnard: Just a couple of questions, your Honor.

#### Redirect Examination

Q. (By Mr. Barnard): Mr. Hornkohl, you stated in answer to one of Mr. Hamilton's questions that you eliminated bacterial canker?

A. As of that time.

Q. As of August 16, 1957? A. Yes.

Q. And the basis of that was the absence of the sourness? [313] A. Yes.

Q. Concerning which you testified?

A. That is right.

Q. On August 16th had the dead limbs on the trees been dead for some time? A. Yes.

Q. And had the trees starting coming back with new shoots? A. Yes.

Q. In your experience, would the sour smell and the oozing of the sap, and so forth, continue after the limb had died? A. No.

Mr. Barnard: That is all.

Mr. Hamilton: No further questions.

The Witness: Am I excused?

(Testimony of Frank Hornkohl.)

The Court: Do you need Mr. Hornkohl further?

Mr. Barnard: No.

The Court: You are excused, Mr. Hornkohl.

The Witness: Thank you.

(Witness excused.)

Mr. Barnard: Mr. Thompson.

### ROBERT K. THOMPSON

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [314]

The Witness: Robert K. Thompson.

#### Direct Examination

Q. (By Mr. Barnard): Would you state your full name?      A. Robert K. Thompson.

Q. And what is your address?

A. 1914 Ganges Avenue, El Cerrito, California.

Q. By whom are you employed?

A. California Spray-Chemical Corporation.

Q. In what position or capacity?

A. Supervisor of field research for the western division.

Q. How long have you held that position, Mr. Thompson?      A. Three years.

Q. And starting back now then, with your schooling, that is advanced schooling, what colleges or universities did you attend?

A. I attended Ohio State University where I received all of my degrees.

Q. Of what?

(Testimony of Robert K. Thompson.)

A. Bachelor of Science in Agriculture, Master of Science and Doctor of Philosophy.

Q. And has your specialty at all times been in agriculture?      A. It has.

Q. Any particular field? [315]

A. Entomology particularly.

Q. Prior to your employment by the California Spray-Chemical Corporation, did you have any other employment?

A. I have had concurrent with the schooling employment by United States Department of Agriculture.

Q. In the field of entomology?      A. Yes.

Q. Now, in your capacity with Cal-Spray, Mr. Thompson, will you explain to the jury just what your department does?

A. My department, which is research and development, is responsible for the testing of new materials which may be developed in our own chemical laboratory, or which may appear on the market from many sources, or which may be brought to us by other companies. We are responsible for evaluating these new chemicals for developing the proper use recommendations, and give these recommendations to, first, our marketing department, and as requested to customers or dealers.

Q. And does that research include inquiries into the dangers of various chemicals, as well as to their values?      A. It does.

Q. Are you familiar with a compound marketed by Cal-Spray under the name of Mitox?

(Testimony of Robert K. Thompson.)

A. Yes.

Q. And can you give us the formula for Mitox?

A. Yes, sir. The formula is para-chlorobenzyl, para-chlorophenyl sulfide.

Q. Were any experiments in connection with Mitox conducted by your department under your direction?      A. Yes, sir.

Q. And over what period of time?

A. Under my own direction since 1955; that is not the earliest date Cal-Spray tested it.

Q. Do I understand then, in other words, that it has been under your direction since you have been with the company, but that experiments were being conducted prior to your association with the company?

A. I was associated with the company prior to this time in other capacities. I have only been associated with the development of Mitox the past three years that I have held this latest position.

Q. I see. Can you tell us generally what experiments were conducted with Mitox?

A. Experiments were conducted to test the efficiency of Mitox to control mites of different types, mainly those known as red spider mites. This is done by comparing it to other known effective miticides at different dosages. Tests were conducted using Mitox in combination with other materials commonly used on trees of various types to show how Mitox might be used in the regular spray program, and tests have [317] been run on all types of fruit trees and other crops at various dosages

(Testimony of Robert K. Thompson.)

to determine its limits of safety, or vital toxicity, that is whether or not it would injure crops.

Q. And after the completion of those tests—withdraw that. Were those tests conducted by you and your department prior to Mitox being placed on the market? A. They were.

Q. After the completion of those tests was Mitox placed on the market for general sale?

A. General sale in the sense that as far as it was available. In other words, there were limitations to manufacturing.

Q. In other words, there wasn't enough?

A. That is right.

Q. But insofar as there was a supply in 1957, was Mitox on general sale by Cal-Spray, as one of its products? A. Yes.

Q. I will show you, Mr. Thompson, Plaintiff's Exhibit 2, and call your attention to the fact that on Plaintiff's Exhibit 2 is the statement "for experimental sale". Can you explain to us what that term means, or meant on that invoice?

A. Experimental sale is a requirement of the United States Department of Agriculture on a new product until such time that they and the Food and Drug Administration are [318] satisfied concerning the possible toxicity of residue that may remain from the use of the chemical on the food crop. In other words, in registering a chemical for sale, and all agricultural chemicals must be registered with the United States Department of Agriculture, they require, first, that you prove its effec-



(Testimony of Robert K. Thompson.)

tiveness to control the insects which are mentioned on the label; secondly, they require that you show if the compound is safe to man in the levels which may remain on the food crops. Generally this is a quite lengthy process of doing the toxicology work as determining the toxicity of the compound and determining chemically what residue of the chemical remains on the food crop. But as this study progresses the United States Department of Agriculture and the Food and Drug Administration may give a registration on "experimental sale", which means that to the best of their knowledge the material is safe, that you can start selling it, and that pending completion of these toxicity studies it is fully registered.

Q. Could it be said, in other words, that this amounts of a temporary registration?

A. In a sense, it is——

Mr. Hamilton: I will object to the question.

The Court: I will sustain the objection. The witness has explained it. [319]

Q. (By Mr. Barnard): Under the conditions that you have described, Mr. Thompson, is it required that the note be made on a sales invoice?

A. Yes, sir, it is a legal requirement.

Q. And that you say is a legal requirement?

A. Yes.

Q. Has the compound known as Mitox received its permanent registration? A. It has, yes.

Q. So that in a sale made at this time it would not be necessary to make such a note on the in-

(Testimony of Robert K. Thompson.)

voice? A. It is not so necessary.

Q. Mr. Thompson, are you familiar with whether or not Mitox is compatible with Ortho-K medium oil? A. Yes, sir, it is compatible.

Q. Is there anything in the compound Mitox which when combined with Ortho-K medium oil would cause any danger whatsoever?

A. Assuming that we are talking about peaches, no.

Q. Mr. Thompson, is a formula containing two pounds of Mitox, four per cent medium oil, and two pounds of lead arsenate per 100 gallons of water sprayed on peach trees at the rate of 260 gallons per acre a safe formula?

A. To the best of my knowledge, that is safe.

Q. Would that be true in the pink bud stage?

A. Yes, sir.

Q. Now, at my request, Mr. Thompson, you have brought two bottles of oil. Are they both the same?

A. They are the same.

Mr. Barnard: They should both be marked. Would you mark that as Defendant's exhibit.

(The bottles referred to were marked as Defendant's Exhibits B and C, for identification.)

Q. Mr. Thompson, I will show you a bottle, which has been marked Defendant's Exhibit B, and——

The Court: For identification.

Q. (By Mr. Barnard): ——for identification, and can you tell us what is in that bottle?

A. This is the stock oil, the pure oil, that is

(Testimony of Robert K. Thompson.)

used to make Ortho-K flowable, and other oil products.

Q. And to that stock oil what else is added to make Ortho-K flowable medium oil?

A. Ortho-K is made with the oil; it contains emulsifying agents which are in general terms soaps or detergents. It contains conditioned agents to bind the detergent with oil, make it stable; and it contains a small amount of casease which is also involved with the emulsification. It contains water, that is the flowable formula contains about [321] 16 per cent water.

Q. What per cent of the final product, Ortho-K medium flowable oil, is the oil contained in Defendant's Exhibit B for identification?

A. 83 per cent of the final product is this oil.

Mr. Barnard: I offer this as Defendant's Exhibit B.

Mr. Hamilton: No objection.

The Court: It will be received and so marked.

(The bottle heretofore marked for identification as Defendant's Exhibit B, was received in evidence.)

Mr. Barnard: May I pass it to the jury, your Honor? (Handing to jury.)

Would the Court prefer to go ahead? I think we can.

The Court: I think you can go ahead.

Q. (By Mr. Barnard): Mr. Thompson, I have handed you another bottle which is marked De-

(Testimony of Robert K. Thompson.)

fendant's Exhibit C for identification. Can you tell me what that contains?

A. This contains the Ortho-K medium flowable, the final product as used by the growers.

Q. As used by the growers. And that contains approximately 85 per cent of the oil represented by Defendant's Exhibit B and the other ingredients which you have just mentioned?

A. 83 per cent of the oil, and water and the emulsifiers as mentioned. [322]

The Court: You offer that?

Mr. Barnard: Oh, I beg your pardon. I offer that.

Mr. Hamilton: No objection.

The Court: Is this the product which the user mixes with the water, the 100 gallons?

The Witness: Yes, sir, this is the product that is used as has been referred to as four per cent, meaning four gallons of this product in 100 gallons of water.

The Court: It will be received and marked Defendant's Exhibit C.

(The bottle heretofore marked for identification as Defendant's Exhibit C, was received in evidence.)

Q. (By Mr. Barnard): Mr. Thompson, are you familiar with a product known as clean-up oil?

A. Yes, sir.

Q. Is clean-up oil a lighter oil, or a heavier oil than the oil represented by Defendant's Exhibit B?

A. Clean-up oil is a heavier oil.

(Testimony of Robert K. Thompson.)

Q. Explain what you mean by heavier?

A. By heavier oil, it can have several meanings. One would relate to viscosity, in other words, the ease of flow, or the part of the chemical constitution. It also involves the purity of the oil, in other words, in general a cruder oil is considered a heavier oil, and a more highly refined oil [323] a lighter oil.

Q. Have you had experience with the use of Ortho-K medium flowable oil on plant foliage?

A. Yes, sir.

Q. Is it safe to use on plant foliage?

A. Yes, sir.

Q. Would it be safe to use four per cent on plant foliage?

A. It depends specifically on the plant and the time of application.

Q. Would it be safe to use on peach trees?

A. Yes, sir.

Q. In the pink bud stage?

A. Yes, sir.

Q. What effect would you observe if such an oil as Ortho-K medium flowable oil was used at the wrong time?

A. The effect then would be first noticed as a difference in color of the leaves, that is from a dark green it would progressively turn lighter green. In an extreme case, which I have not seen with this particular oil, but with other oils, it goes from the light green to a yellowish green.

Q. And then eventually does the leaf die?

(Testimony of Robert K. Thompson.)

A. Eventually it would not die on the tree; eventually it may drop, which is equivalent to death, I suppose.

Q. Could Ortho-K medium flowable oil result in killing [324] of the major limbs of a peach tree?

A. In my opinion it could not so result.

Mr. Barnard: You may cross examine.

#### Cross Examination

Q. (By Mr. Hamilton): Did I understand you correctly, sir, to state that you were employed by the United States Department of Agriculture at the same time you were attending school?

A. Yes, sir.

Q. Now, you stated that you conducted experiments with the use of chemicals, agricultural chemicals, on all kinds of vegetables, plants, including trees. Now, let's narrow that down.

The Court: Now, was that a question?

Mr. Hamilton: No, it was a statement.

The Court: Well, is that statement correct?

The Witness: I am not certain I said "all", but in essence I implied that.

The Court: All right.

Mr. Hamilton: Thank you.

Q. Narrowing it down to the use of oils on stone fruits, how many experiments have you conducted personally using oils on stone fruit trees?

A. By personally, you mean under my direction?

Q. Yes. [325]



(Testimony of Robert K. Thompson.)

A. I would say it would be in the range of 40 to 50.

Q. Where?

A. Throughout California, New Jersey, New York, Ohio, Washington and Oregon.

Q. Now, describe these experiments.

A. In these experiments, generally they are applied by a power sprayer, that is a sprayer driven with some type of combustion engine, which operates a high pressure pump. This pump forces the spray through the hose and a nozzle to form a mist over the tree. This is directed at the tree, wetting the tree with the spray, and this is done by certain, what we call scientific methods, that is, we divide a plot of trees up. It may be any size plot, for example, ten trees, to ten acres, and there will be different treatments applied to different trees in that plot, and all the trees receiving the same treatment will not be together, but will be scattered throughout the plot, so that you can get an average experience over the area treated, and so it enables you to make comparisons between your treatments. Sometimes these treatments involve the comparison of materials, sometimes the comparison of different dosages of the same material, and similar comparisons to that.

Q. Now, what is the critical range in percentage of oil applied to stone fruits at which point damage will appear?

A. Damage in the form as I described, as the lightening [326] of the chlorophyll or the green

(Testimony of Robert K. Thompson.)

color could appear at different dosages depending on the soil moisture, the type of soil, the temperature, the stage of tree growth, most every orchard you go into would be different. It is difficult to draw generalizations. However, to try to do so and answer your question, you might generalize that with the particular oil involved here, Ortho-K, which is known as a summer oil, or one of the more highly refined, that we have known trees to be sprayed at ten per cent without injury; we have known trees to be sprayed at 40 per cent without injury; and yet at the same dosages at other places and under other conditions they might show injury.

Q. In other words, it is a factor that is so variable no absolute rule can be laid down?

A. No absolute rule, that is right, with this type of oil.

Q. Do you have an experimental stone fruit plot or orchard in California?

A. In the sense that we own such a plot, no.

Q. Have you personally conducted experiments on stone fruits in California?      A. Yes, sir.

Q. Where?

A. This is done with the cooperation of many growers. It has been done here in Fresno, in the Sacramento area, Yuba [327] City.

Q. Let's limit it to Fresno. What grower?

A. I do not recall specifically the names of those growers. This was done by men under my direction.

Q. You are familiar with the Western Fruit

(Testimony of Robert K. Thompson.)

Grower, are you not?      A. Yes, sir.

Q. Is the compatibility table published annually by the Western Fruit Grower an authoritative table?

A. To a certain extent it is authoritative. I think that the authors are sincere in their efforts, although they might not be completely correct in all statements given therein.

Q. Have you reviewed the 1958 Western Fruit Grower compatibility table?      A. Yes.

Q. It appears in that table, does it not, that Mitox and the dormant oils are compatible?

A. Yes, sir.

Q. But it does not appear that Mitox and foliage spray oils are compatible, is that correct?

A. Yes, sir.

Q. To your company, wouldn't it be a valuable thing to have it appear that Mitox and foliage oil were compatible?

A. It would be valuable, but impossible. Mitox is not [328] registered for use in a foliage spray.

Q. Because it is not compatible?

A. No, sir, absolutely not.

Q. What, sir, if you can explain to me in simple language that I can understand, is the difference between your—and by your, I mean California Spray-Chemical Company's—clean-up oil and its Ortho-K oil?

A. The main difference between clean-up oil and Ortho-K is in the degree of refinement.

(Testimony of Robert K. Thompson.)

Q. The base oil is the same, is that correct?

A. The base oil is——

Q. Stock oil, let's call it.

A. No, sir. It is the same only when it comes out of the ground as crude oil. From then on it goes through different processes of refinement, and Ortho-K is carried farther in the degree of refinement.

Q. And in that refinement what is attempted to be done by the refiner?

A. In the refinement they remove various fractions, such as kerosene, gasoline, lube oils, asphalt, and one of these fractions is spray oil.

Q. Isn't one of the purposes of additional refinement to remove sulfur from the oil?

A. No, the sulfur isn't removed by the refinement. The sulfur in crude oil is sedimental and is removed by [329] filtration, not through refinement.

Q. In any event, the process that your Ortho-K oils go through, the more highly refined oil has more sulfur removed from the oil than your clean-up oil, is that not correct?

A. I do not think so because the sulfur is removed before this treatment, the difference in the treatment.

Q. Is it not, sir, correct that one of the important tests to determine whether an oil should be used as a dormant oil or as a foliage oil is to ascertain the amount of unsulfinated residuals?

A. Yes, sir.

(Testimony of Robert K. Thompson.)

Q. And that unsulfinated residual means residual without the sulfur molecules, does it not?

A. No, sir.

Q. What does it mean?

A. Unsulfinated residue means that fractions of certain compounds in there which are injurious, which do not react to sulphuric acid, that the more highly refined oils are more highly treated with sulphuric acid, and you are actually adding sulfur to react with other compounds in the oil so that they may be drawn off in a later filtration.

Q. And that deprives those other compounds of sulfur, does it not?

A. In general, these other compounds are not sulfur [330] compounds.

Q. Sir, is there any danger in using a foliage oil in conjunction with sulfur?      A. Yes, sir.

Q. Those two agricultural chemicals are not compatible?      A. That is right.

Q. But there is no danger in using sulfur with a dormant oil, is there?

A. No practical danger.

Q. Those two are compatible?

A. There is a difference in compatibility.

Q. Mitox has some sulfur in it, does it not?

A. Yes, sir.

Q. The invoices setting forth the sale of Mitox to Charles W. Grimm were marked "experimental sales" for the reason that Mitox had not been approved by the United States Department of Agriculture, is that correct?

(Testimony of Robert K. Thompson.)

A. No, sir, it is not correct.

Q. I wonder if you would explain that again, why it had to be marked "experimental sale" if it was not because it had not been approved by the United States Department of Agriculture?

A. Well, it had been approved for sale by the United States Department of Agriculture, but was required to be marked "for experimental sale" because that status of the [331] toxicity tests were—well, they were incomplete. In other words, the minimum requirement on this type of compound is a two-year study. Many times it takes longer than that, and our two-year period was not up, but it was far enough along that the data was acceptable for the approval of the product for a one-year period, because experimental sales registration lasts for just one year. At the end of that time then you obtain the complete registration or approval.

Mr. Hamilton: I have no further questions.

### Redirect Examination

Q. (By Mr. Barnard): Mr. Thompson, these toxicity studies to which you just referred, are they studies as to the effect on human beings, or on trees?

A. Very rarely on human beings; most often on rats and dogs.

Q. What I meant is, are they studies as to the effect of residue which might be left on the fruit?

A. Yes, it is studies to try to learn what such effect would be.



(Testimony of Robert K. Thompson.)

Q. Now, referring to the Western Fruit Grower, to which Mr. Hamilton called your attention——

A. Yes.

Q. The compatibility chart, does that chart show that Mitox is not compatible with summer oil?

A. No, sir.

Q. Is it? A. It is.

Q. Is Ortho-K medium flowable oil a new product? A. No, sir, a very old product.

Q. Approximately how long has it been on the market, have you any idea? A. About 30 years.

Mr. Barnard: That is all.

Mr. Hamilton: No questions, your Honor.

Mr. Barnard: May Mr. Thompson be excused?

Mr. Hamilton: He may be excused.

The Court: You are excused as far as the Court is concerned, Doctor. The next witness?

(Witness excused.)

Mr. Barnard: Mr. Hanna.

## JOHN LINDSAY TIMOTHY HANNA

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: J. L. Timothy Hanna.

### Direct Examination

Q. (By Mr. Barnard): Would you state your full name, please?

A. John Lindsay Timothy Hanna. [333]

Q. And where do you live, Mr. Hanna?

(Testimony of John Lindsay Timothy Hanna.)

A. Bakersfield, California.

Q. What is your business or occupation?

A. I am an agricultural consultant.

Q. Independent? A. Independent, yes.

Q. In 1957 what was your business or occupation?

A. I was employed by Cal-Spray as field representative, sales representative in the field.

Q. In what area? A. Wheeler Ridge.

Q. That is in Kern County, is it?

A. Southern part of Kern County.

Q. How long had you been so employed?

A. I think a little over four years, as of March 1, 1958.

Q. And in all of that time were you employed as a field representative? A. Yes, sir.

Q. Generally what are the duties of a field representative?

A. To check growers' crops and advise them on insect population, identification, and type of material to use for eradication.

Q. And in connection with that occupation did you become acquainted with Mr. Charles Grimm?

A. Yes, sir.

Q. About how long ago did you first meet him?

A. A little over three years ago, I believe.

Q. Did you see him then from time to time after that? A. Yes, sir.

Q. Are you familiar with Mr. Grimm's peach orchard, in the Wheeler Ridge area of Kern County? A. Yes, I am.

(Testimony of John Lindsay Timothy Hanna.)

Q. And have you visited that ranch on many occasions? A. Yes.

Q. Did you in connection with your employment as a field representative by Cal-Spray make periodic visits to Mr. Grimm's ranch? A. Yes, I did.

Q. About how often did you go there?

A. I think my average calling on Mr. Grimm would be twice a week perhaps, sometimes oftener in different seasons than in other seasons.

Q. Referring to the months of December of 1956 and January of 1957, did you visit Mr. Grimm's orchard? A. Yes, sir.

Q. And did you make an examination of the orchard?

A. Yes, I did. I believe that to be in January.

Q. Of 1957? A. '57, yes, sir. [335]

Q. Is that as close as you can come to the actual date?

A. Yes. I don't remember; that is so long ago I have forgotten exactly when it was.

Q. Did you at that time examine his orchard?

A. I did, yes.

Q. And what was the purpose of your examination?

A. Well, actually it was a periodic examination, part of my duties with Cal-Spray, but I was looking for deposits of spider mite eggs, any scales that might be present on the trees, or any other insects, general condition of the orchard and the vineyard.

Q. Did you find any evidence of spider mites and scale? A. Yes, sir.

(Testimony of John Lindsay Timothy Hanna.)

Q. This is in this examination some time in the month of January?

A. It was, I believe, in the first part, first half of January I would say would be safe.

Q. Did you thereafter have a conversation with Mr. Grimm about what you found? A. Yes.

Q. And can you tell us generally what that conversation was?

A. I advised Mr. Grimm that I found a relatively heavy deposit of spider mite eggs and I had found slight indications of scale population spotted throughout his orchard. [336]

Q. And was that in the Merrill Gem Peaches?

A. That was in all the peaches.

Q. Merrill Gems, the Blazing Gold and the Gold Dust? A. Yes, sir.

Q. Did you at that time recommend a course of treatment to Mr. Grimm?

A. No, I did not at that time.

Q. Did you go back then later to his orchard?

A. Yes.

Q. And approximately when was that?

A. I believe, if I am not mistaken, I made two trips to that orchard in the latter part of January, and I made four or five trips in February.

Q. Did you at any one of those trips recommend a course of treatment to Mr. Grimm?

A. Yes, I did.

Q. Can you tell us approximately when that was?

(Testimony of John Lindsay Timothy Hanna.)

A. I think I first—I made my first recommendation to Mr. Grimm in the latter part of January or the first part of February of 1957.

Q. Do you recall what you recommended?

A. Yes, I do.

Q. And what was it?

A. I recommended that he spray his orchard with four per cent Ortho-K medium oil per 100 gallons of water, and [337] that would be four gallons per 100 gallons, and four pounds of basic lead arsenate, two pounds of Ortho Mitox; that was all to go in 100 gallons of water, and I recommended that he use 400 gallons to the acre to get coverage of the trees.

Q. Did Mr. Grimm say anything to you at that time?

A. Well, he said he didn't like the idea of the oil.

Q. What did you say, or what did you do?

A. I would like it for the record, this was not my basic recommendation. I was repeating a recommendation given to me.

Q. In other words, in between some of these visits had you obtained a recommendation from someone else, is that what you mean?

A. Yes, would you care for me to explain that?

Q. Yes, please.

A. Mr. Harold Fisher, who is the branch manager of the Bakersfield branch of the Cal-Spray had come from a peach growing and producing

(Testimony of John Lindsay Timothy Hanna.)  
area, and I respected his advice on peach trees, recommendations, because I was more familiar with field crops. I contacted him, Mr. Fisher that is, and told him of my findings on Mr. Grimm's orchard, and consulted with him on a recommendation, which he gave me, and which I passed along to Mr. Grimm.

Q. I see. Then when Mr. Grimm objected to the oil, did you discuss that objection with Mr. Fisher? [338]

A. I believe that I talked to Mr. Fisher on the radio at Mr. Grimm's ranch.

Q. I see. And as a result of these conversations was certain material delivered to Mr. Grimm's ranch for spraying? A. That is correct.

Q. And that, as has been testified to and is admitted, was the formula which you have just described?

A. That is correct. They delivered the material at my request to the ranch.

Q. Now, were you present when the material was being sprayed?

A. I checked the spraying as it was going on. I wasn't there the whole time.

Q. And that was on March 5th and 6th?

A. 5th and 6th, I believe.

Q. Of 1957? A. Correct.

Q. What was the next thing that you knew or heard of concerning Mr. Grimm's orchard?

A. Well, Mr. Grimm called me, I believe it was



(Testimony of John Lindsay Timothy Hanna.)

in the neighborhood of a week later, and asked me to come out and check some of his peach trees that—check and report to him what my findings were, which I did.

Q. And what did you find?

A. I found some bloom shedding in the Blazing Gold, I [339] believe, and also some pistil burn, which I reported to Mr. Grimm.

Q. Did you find anything else at that time?

A. No, sir.

Q. Did you later hear from Mr. Grimm again?

A. I checked back myself some time later, to re-check these peach trees I just mentioned that had a slight, oh, burn I guess, from the oil, and to re-check to see how it was progressing.

Q. First, approximately how long after your first visit was the second visit?

A. Within—well, I would imagine it would have been within a couple of days.

Q. Is that your best estimate at this time?

A. Yes. I don't exactly remember the time.

Q. And what did you find as far as the Blazing Gold and the Gold Dust trees were concerned, on your second visit?

A. Oh, about the same condition. It didn't look to me like it was getting any worse, and I reported to Mr. Grimm that I wasn't too concerned about it. And then I spotted a tree in the other orchard, which would be the Merrill Gems, one isolated tree out there, and I called Mr. Grimm out to observe it.

Q. Where was that tree in the orchard?

(Testimony of John Lindsay Timothy Hanna.)

A. This is an approximation, it was four or five trees [340] in from the east side of the orchard, and I would guess maybe 10 to 12 trees north from the south side of the orchard, cornering it that way.

Q. All right. Now, will you describe the condition that you found in that tree?

A. Yes. The tree looked awfully sick, it was withering up somewhat, and at first to me I thought it was an economic problem, that is, it needed plant food, fertilizer. And the tree looked rather—well, it looked awfully sick, so I recommended to Mr. Grimm that I give him some leaf feed to put on that tree to see if we could snap it out of it.

Q. And did you do so?

A. I gave him some material, and I don't believe he used it.

Q. All right. Did you go back to his orchard then at a later date?      A. Yes, I did.

Q. About how long was it?

A. If I remember correctly, it was about a week later that Mr. Grimm requested me to come out to the orchard again.

Q. What did you find at that time?

A. I found several sick trees in the Gem variety.

Q. What visual evidence did you see?

A. The leaves were discolored, what little there was—you know, at that time of year—and shriveling, the branches [341] were drooping. I dug into the tree with my knife to investigate, and it has been stated, the cambium layer was dark. They looked

(Testimony of John Lindsay Timothy Hanna.)  
in a very unhealthy state, very sick, and I didn't like it.

Q. Now, Mr. Hanna, in order to conserve time, may I ask you if you were in the court room and heard Mr. Grimm testify concerning the spreading of this condition through the orchard?

A. I heard Mr. Grimm's testimony, yes, sir.

Q. And did you visit that orchard from time to time again later in the spring?

A. Yes, I visited the orchard very often.

Q. Did the spreading condition occur substantially as Mr. Grimm explained, testified it did?

A. That is correct.

Q. Now, also in the late summer, did the improvement in the trees occur as Mr. Grimm testified?

A. Qualify late summer for me, please, Mr. Barnard.

Q. Well, say in September?

A. September? I think there was an improvement there in September.

Q. All right. Now, what did you do, Mr. Hanna, after you discovered this condition more or less prevalent in the orchard?

A. I contacted Mr. Hal Fisher and requested that he [342] and/or Dr. Sessions accompany me out to the orchard to look at it with me as soon as possible.

Q. And did you go out there with Mr. Fisher and Dr. Sessions at a later date?      A. Yes, I did.

(Testimony of John Lindsay Timothy Hanna.)

Q. About how long later was that?

A. I think it was a couple of days.

Q. What did you do?

A. Well, I didn't know what the trouble was there, and I asked them to help me.

Q. I mean, physically what did you do?

A. Oh, physically; I beg your pardon. We inspected the wood with knives, peeling it back. We walked through most of the orchard, made visual inspection of all angles of the tree, the sides and tops, and I believe we dug some dirt around some of the roots to inspect it, and asked Mr. Grimm what his cultural practices had been, what his economic practices had been, his irrigation. That is about it.

Q. Did you personally conduct any laboratory tests, or tests of any kind?      A. No, I did not.

Q. Did you follow the Grimm orchard then through the balance of the year?

A. I did, yes. I would like to qualify that; during the summertime I am awfully busy and I did not call regularly [343] to observe the orchard, but every time I was in that very close vicinity I would go and look at it.

Q. Did you continue your investigation to determine the cause of the condition, or did you leave that up to other employees of your company?

A. I left that up to the more qualified personnel of the company.

Mr. Barnard: I have no further questions.

(Testimony of John Lindsay Timothy Hanna.)

Cross Examination

Q. (By Mr. Hamilton): Mr. Hanna, you referred to a conversation between you and Mr. Grimm, in which Mr. Grimm raised an objection to the use of four per cent oil in the spray that you had recommended. A. Yes.

Q. Do you recall referring to that conversation?

A. Yes, I do.

Q. Then immediately afterwards you said you talked to Mr. Fisher on the radio. What did you mean?

A. I contacted—we have two-way radios in the cars.

Q. You had a two-way radio in your car?

A. Yes, sir.

Q. So you could immediately, if you wanted to talk to Mr. Fisher, pick up the receiver in your car and contact him?

A. Yes. Normally it is for the office calls for people [344] trying to get ahold of us, they would get us on the radio and we would get there much more quickly.

Q. So while you were discussing this percentage of oil with Mr. Grimm, you contacted Mr. Fisher and obtained his further approval of your four per cent solution? A. That is correct.

Q. When Dr. Sessions came down, Mr. Hanna, did you go to the Grimm orchard with Dr. Sessions the first time? A. Yes, I did.

Q. Who else was with you?

(Testimony of John Lindsay Timothy Hanna.)

A. Mr. Fisher.

Q. And did you assist Mr. Fisher and Dr. Sessions in their examination of the orchard?

A. Yes, I did.

Q. And do you know how many times Dr. Sessions visited the Grimm orchard for the purpose of examining it?

A. On two occasions, Mr. Hamilton, I was with him, and I believe to the best of my knowledge he was there once more when I wasn't present.

Q. On the second occasion when you were with Dr. Sessions at the Grimm orchard, did you assist him in his investigation of the orchard?

A. You confuse me a little on the word "assist". I was just walking along listening, because I didn't have any idea what was wrong. [345]

Q. You were just along listening. You didn't gather material for him?

A. Not on the second time, no. No, that—he requested me to do some work for him at a later date, which I later did.

Q. Was that in connection with the Grimm orchard?      A. Yes, it was.

Q. And what was that?

A. He requested me to take a soil profile 12 feet deep every six inches, and take in to the laboratory and have a soil analysis performed and give him the analysis, which I did.

Q. So in answer to counsel's question about having performed no laboratory tests, you meant no



(Testimony of John Lindsay Timothy Hanna.)

laboratory tests by yourself personally, is that correct?

A. Yes, that is what I thought he meant.

Q. But you did gather some material, that is to say, you got an auger and dug into the earth in the Grimm peach orchard, down to a depth of 12 feet, is that correct?

A. Well, I really went to 13 feet 2 inches, or something, but I took what Dr. Sessions requested me to do, and took all the cores into the——

Q. Took cores from that——

A. Profile, yes, and took it into the lab and they ran the tests themselves in there.

Q. Mr. Hanna, you have referred to seeing one sick tree in the Grimm orchard, and I believe you were the first [346] person that noticed that tree.

A. To the best of my knowledge, I pointed out——

Q. You called Mr. Grimm's attention to it?

A. That is correct, yes.

Q. Was the foliage on that tree yellowish in appearance?

A. It appeared to be very chlorotic, yellowish.

Q. It was a lighter color than a normal healthy tree should be?

A. That is correct.

Q. And by chlorotic you mean yellowish?

A. That is correct.

Q. Now, at a later time you noticed that sickness appear to spread over the orchard, is that correct?

(Testimony of John Lindsay Timothy Hanna.)

A. Yes—I wasn't the first to notice that, but I noticed it.

Q. No, but you noticed it? A. Yes.

Q. And in the balance of the orchard, the foliage would turn a light green or a chlorotic color?

A. To the best of my recollection you are correct, yes.

Q. Thank you. Now, you stated you would visit the Grimm ranch about two times a week, is that correct? A. Yes, sir.

Q. Did that also apply to the summer periods?

A. When I was enjoying Mr. Grimm's account business [347] it applies to the summer period as well, yes, sir.

Q. Now, those trips to the Grimm ranch, they were for business purposes, were they not?

A. Yes, certainly.

Q. You were trying to sell him agricultural chemicals for the benefit of yourself and Cal-Spray?

A. Plus trying to do a good job taking care of his fields, vines, trees, cotton.

Q. At any time, either before or after this injury occurred to Mr. Grimm's orchard, has Mr. Grimm refused to allow you to come on the orchard and make any examination you desired to make?

A. Very definitely not; he has been very cooperative.

Q. Do you know of any instance in which Mr. Grimm refused to allow any Cal-Spray employee to come on his ranch and investigate?

(Testimony of John Lindsay Timothy Hanna.)

A. I believe there was one instance I heard about.

Q. And what was that?

A. I believe that Mr. Grimm refused to let Mr. Fisher take some stumps out, something of that sort, that nature.

Q. But that is the only instance you have heard of?

A. That is the only one I know of, yes.

Mr. Hamilton: I have no further questions.

The Court: You are through with this witness, Mr. Barnard?

Mr. Barnard: Yes. [348]

The Court: You are excused.

Mr. Hamilton: Your Honor, I should like to have this witness instructed to stay.

The Court: All right. Well, you are not excused.

(Witness temporarily excused.)

The Court: Members of the jury, we will reconvene tomorrow morning at 9:30. I have another group coming in to be selected for the jury in another case, so we will reconvene in this case at 10:00 o'clock tomorrow morning. [349]

(Admonition to jury and recess at 4:30 p.m. until 10:00 a.m., April 11, 1958.)

Friday, April 11, 1958. 10:00 A.M.

The Court: Do counsel stipulate the presence of the jury?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Next witness?

Mr. Barnard: Mr. Ogden.

### GEORGE W. OGDEN

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: George W. Ogden.

The Clerk: Have that seat.

### Direct Examination

Q. (By Mr. Barnard): Mr. Ogden, would you state your full name, please?

A. George W. Ogden.

Q. And where do you live?

A. 4609 North Flower Avenue, Clovis.

The Court: Mr. Ogden, I am going to ask you to keep your voice up, so everybody can hear you.

Q. (By Mr. Barnard): What is your business, Mr. Ogden?      A. Farming.

Q. And how many acres do you farm? [352]

A. Sixty.

Q. And is that located at your home, the address of which you have just given us?

A. It is.

Q. What type of crops do you raise?

A. Peaches and grapes.

Q. How many acres of peach trees do you have?

A. Close to 20.

Q. And referring to the year 1957, if there has been any change, what varieties of peaches did you grow?

(Testimony of George W. Odgen.)

A. Kim Alberta and Gold Dust, Blazing Gold and Red Haven.

Q. Do you know what root stock those trees were grown on?

A. The Gold Dust, Blazing Gold, Red Haven are on S-37 stock, and the Kim Alberta is on Lovell, I think. They were planted before I bought the place.

Q. How old are the trees in your orchard, by varieties if necessary?

A. I planted the Gold Dust in 1951, and planted the Red Haven in 1954, and the Blazing Gold in 1955, and the Kim Albertas were planted, I believe, in 1945. They were planted by the previous owner.

Q. I see. Now, in the year 1957 did any unusual condition develop or exist in your peach orchard?

A. Yes, the trees budded out and on quite a lot of them the buds turned brown shortly after the leaf buds opened, [353] and parts of the trees began dying, some of them died entirely, and some of them were only part, a limb here and there.

Q. Did that condition continue throughout the growing season?

Mr. Hamilton: Your Honor, I am going to object to this line of questioning to this witness, on the basis that we are concerned in this action with a Merrill Gem peach orchard. This witness has indicated that he has no Merrill Gem peach orchard on his ranch. The similarity, I do not believe, is

(Testimony of George W. Odgen.)

sufficiently established for this material to have any relevancy here.

Mr. Barnard: If the Court please, it seems to me that is a matter of weight of the evidence. Counsel has insisted at various times throughout the trial that the Merrill Gem is a relatively new peach, there aren't very many orchards containing the peach. The evidence from other witnesses has been to the effect that the Merrill Gems were perhaps more susceptible to certain diseases, but not that other varieties do not suffer the same diseases. I believe it is just a question of weight.

The Court: Well, I don't think, Mr. Barnard, that there is sufficient foundation. We have two orchards separated by a hundred miles or more. I don't know about climatic conditions, soil conditions, water conditions.

Mr. Barnard: If the Court please, that is probably true, [354] and I intend to develop that through other witnesses. Mr. Odgen is a farmer; he has been able to get in his fields for the first time in weeks, and I wanted to use him when it was convenient.

The Court: I don't think I will permit the examination of this witness until a foundation has been established. You may remove him from the witness now, if you care to recall him.

Mr. Barnard: Very well, then, Mr. Odgen, would you step down, and I am afraid you will have to remain so that I can recall you later.

(Witness temporarily excused.)



Mr. Barnard: Mr. Fisher.

HAROLD C. FISHER

called as a witness for defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Harold C. Fisher.

Direct Examination

Q. (By Mr. Barnard): Will you state your full name, Mr. Fisher?

A. Harold C. Fisher.

Q. And what is your address?

A. 1821 Burton Way, Bakersfield, California.

Q. And what is your business or occupation?

A. I am branch manager for California [355] Spray-Chemical Corporation at our Bakersfield office.

Q. How long have you been so employed?

A. Since October of 1956.

Q. Prior to that time were you employed by Cal-Spray? A. Yes, I was.

Q. In what capacity?

A. As sales representative.

Q. In the Bakersfield area, or some other place?

A. No, in the Fresno area.

Q. How long all told have you been employed by Cal-Spray? A. Since June of 1951.

Q. Mr. Fisher, do you know Mr. Charles Grimm? A. Yes, I do.

Q. How long have you known him?

A. Since, I believe, in the late fall of 1956, that I first met Mr. Grimm.

(Testimony of Harold C. Fisher.)

Q. At that time was Mr. Hanna one of the field representatives working under you?

A. Yes, he was.

Q. And did you meet Mr. Grimm through Mr. Hanna? A. Yes, I did.

Q. Have you had occasion, Mr. Fisher, to visit Mr. Grimm's peach orchard? A. Yes, I have.

Q. And I refer to the Merrill Gem peach orchard. [356]

A. Yes.

Q. Do you recall the first time you visited that orchard?

A. The first time I saw the orchard was in the fall of 1956. However, I didn't at that time go into the orchard.

Q. Do you recall the first time you actually went into the orchard?

A. The first time I actually went into the orchard for any kind of examination was during either late March or early April of 1957.

Q. And that was after the spray had been applied that has been testified to here? A. Yes.

Q. Prior to that time, Mr. Fisher, had you had anything to do with recommending what formula of spray should be applied to Mr. Grimm's orchard?

A. Yes, I had.

Q. And was that through Mr. Hanna?

A. Yes.

Q. In other words, you didn't personally talk to Mr. Grimm? A. No, I did not.

(Testimony of Harold C. Fisher.)

Q. Did you have more than one conversation with Mr. Hanna concerning the formula?

A. I wouldn't be positive that I have more than one conversation concerning this formula. I believe however that [357] I did.

Q. And ultimately was the formula which was applied the recommendation which you passed on to Mr. Hanna, to be in turn passed on to Mr. Grimm?

A. That is correct.

Q. Was that formula a standard formula recommended by the company?

A. It is a formula recommended by the company.

Q. Now, referring then to your visit in the latter part of March or early April to the Grimm orchard, what prompted you to go out there at that time?

A. I had a call from Mr. Hanna to the effect that there was something wrong with Mr. Grimm's orchard and he would like to have my advice on it.

Q. And did you go out there with Mr. Hanna?

A. Yes, I did, that same day.

Q. Was Mr. Grimm there?

A. I believe he was. However, I am not positive whether Mr. Grimm was with us, or his foreman.

Q. At any rate, did you make an examination of the orchard? A. Yes, I did.

Q. And what condition did you find?

A. I found the trees, or a lot of the trees to be receding. By receding, I mean the leaves, you might say, were [358] turning color and marginal burn-

(Testimony of Harold C. Fisher.)

ing, the bark on the lower half of the tree was quite discolored, and with a slight sour odor.

Q. Is that all you found?

A. That is right, yes.

Q. Did you later visit Mr. Grimm's orchard again?

A. Yes, I visited it again the following day.

Q. Did you notice any different condition at that time?

A. No, I would say no different at that time.

Q. What did you do, Mr. Fisher, after having observed this condition?

A. When I had observed this condition the first day I cut a few twig samples and took them with me to Bakersfield, and in the meantime I had called Dr. Sessions, whom I met in Bakersfield that evening.

Q. And then did you and Dr. Sessions visit the orchard?

A. Yes, my second visit to the orchard was with Dr. Sessions.

Q. Was Mr. Grimm there at that time?

A. Yes, Mr. Grimm was there at that time.

Q. Let me ask you, I believe this is repetitious, you stated you found no substantial different condition the second day than the first?

A. That is correct.

Q. Did you visit Mr. Grimm's orchard at any later date? [359]

A. Yes, I did. I believe it to be in the latter part of April.

(Testimony of Harold C. Fisher.)

Q. And who was present at that time?

A. Dr. Sessions, three—let's see, I believe Mr. Rizzi, from the pomology department of the University, Mr. Hensley, I believe his name is, from the University, and a Mr. Harris from the University, and I believe a Mr. Fred Hench from the Farm Adviser's office in Kern County.

Q. What was done on that occasion?

A. We discussed it with these people, and again looked in the orchard ourselves.

Q. Was the condition of the orchard any different than the condition you had noticed the first time?

A. I would say it appeared to be more advanced.

Q. By that, you mean the unusual condition appeared to be more advanced?

A. What I think I mean—or what I mean by this statement is that the trees with no apparent condition, there was no condition—the trees which did not have the condition were further advanced in their growth, and so the sick condition appeared to be worse.

Q. Did you visit Mr. Grimm's orchard at any time later than after the latter part of April?

A. Yes, I did, about mid May.

Q. And who was present at that time? [360]

A. I was there alone with Mr. Grimm.

Q. Did you have a conversation with him then?

A. Yes, I did.

Q. Will you tell us as closely as you can what he said to you and what you said to him?

(Testimony of Harold C. Fisher.)

A. Well, I went with the express purpose of trying to get to the bottom of this whole problem, and I asked him for permission to dig one or two trees, dig them up by the roots. He refused by stating that the first time—the next time, or when the trees were dug on the place he would take them out with a bulldozer. Then I asked him if he would do me the favor of coming to Fresno with me and viewing some orchards that had similar condition, which he refused. And he told me at that time that the next time the Cal-Spray representative came on the place he would like to see them with a checkbook in their hand.

Q. Did you at that time, Mr. Fisher, or at any other time tell Mr. Grimm that you thought the cause of the condition was an oil injury?

A. I did not.

Q. And did you at that time, or any other time, tell him that a man from Richmond who carried a checkbook would be down to settle?

A. I did not.

Q. After that conversation in May, did you have any [361] further conversation with Mr. Grimm?

A. No, I didn't.

Q. Have you been on his place since?

A. I have been on the place one time since, I believe in June.

Q. Of 1957?           A. Yes.

Q. Was the condition in June any different than you had noticed previously?



(Testimony of Harold C. Fisher.)

A. No different except there was some re-growth.

Q. Have you yourself conducted any laboratory tests or experiments since April of 1957 in an attempt to discover the cause of this condition?

A. I conducted no laboratory tests myself. However, I did ask deep soil samples be taken.

Q. And that was done, was it?

A. Yes, it was done.

Q. Were the results of the soil tests satisfactory?

A. It appeared to be. However, there were certain things that probably aren't the best for growing conditions, but we didn't feel them to be real detrimental so far as peach growing is concerned, or at least it wouldn't cause such a fast decline.

Mr. Barnard: You may cross examine. [362]

#### Cross Examination

Q. (By Mr. Hamilton): Mr. Fisher, if I recall your statement correctly, the first time that you went on the Grimm ranch after March 5th and 6th of 1957, you noted a condition of the trees which you termed receding. Was that a condition of the Merrill Gem peach trees?

A. That was the condition of the Merrill Gems.

Q. Now, what did you mean by the use of the term receding?

A. What I meant was the trees had started to bud out, the leaves were forming, the blossoms had come out, and were starting to die back.

(Testimony of Harold C. Fisher.)

Q. Then immediately after that use of the term receding, you stated the leaves were turning color. What color?

A. They were turning color with a burning on the edge, turning to a yellowish color on the edges.

Q. Light green or yellowish color, would that fairly describe it? A. Yes.

Q. This burning effect on the edge, was that a slight margin on the edge?

A. It was a marginal burn.

Q. Would that burned edge, say, be the width of a pencil line, or would it be wider than that? [363]

A. It would vary with different leaves; it might be that width, or up to possibly one-eighth inch.

Q. You, sir, did your advanced schooling at Fresno State, did you not?

A. That is correct.

Q. And you have a degree in horticulture from Fresno State? A. That is correct.

Q. As a student did you do any work in soil analysis? A. I had only one course with soils.

Q. Since your graduation from college, have you made any study of soil analysis?

A. Only in the fact that I have studied soil courses in night school since my college days.

Q. And that was sufficient for you to read the soil analysis with some degree of knowledge of the import of its content?

A. I have a chart that explains the analysis.

Q. And you did obtain a report of the soil analysis of the Grimm ranch?

(Testimony of Harold C. Fisher.)

A. I did obtain a report of the soil analysis.

Q. And the comparison of that report and your chart indicated to you that while these conditions might not be perfect, they were reasonably good; is that a fair statement?

A. I would say they were reasonably good enough that [364] we wouldn't have had this very fast recession, yes.

Q. According to your opinion, after the study of that soil analysis, there was no relation between the condition of the orchard and the result of the soil analysis?

A. I don't believe so. However, there was one thing in this soil analysis that did bother me, the fact that at about seven and a half feet there was what I would say was a false water strata. If the roots had got into this strata we would have a definite souring of the trees.

Q. Tim Hanna worked under you, did he not?

A. Yes, he did.

Q. He was under your direct supervision and control?      A. That is correct.

Q. Did Mr. Hanna make any recommendations to you concerning the disposition of Mr. Grimm's claim?      A. No, he did not directly to me.

Q. Did he by written communication, and by that I mean interoffice communication, make any recommendations to you concerning the disposition of Mr. Grimm's claim?

A. No. I might ask, sir, what do you mean by disposition?

(Testimony of Harold C. Fisher.)

Q. Whether the company should settle.

Mr. Barnard: If the Court please, I will object to that as incompetent, irrelevant and immaterial.

Mr. Hamilton: This is the manager.

The Court: I think I am going to overrule the objection. [365] The questions were concerning the disposition of the claims. I will overrule the objection to that question.

The Witness: May I have the question again?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Monetarily, you mean?

Q. (By Mr. Hamilton): Yes.

A. No, he did not.

Mr. Hamilton: I have no further questions.

Mr. Barnard: No questions.

The Court: That is all, Mr. Fisher. Next witness?

(Witness excused.)

Mr. Barnard: Mr. Howard.

### FRED K. HOWARD

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Fred K. Howard.

### Direct Examination

Q. (By Mr. Barnard): Your name is Fred K. Howard?

A. That is right.

Q. And where do you live, Mr. Howard?

(Testimony of Fred K. Howard.)

A. 213 North Oxford Street, Lindsay. [366]

Q. What is your business or occupation?

A. I am a retired agriculturist, doing some consultant work.

Q. And by consulting work, what do you mean?

A. Investigating all types of conditions in orchards and field crops, to determine what the causes are, if there are adverse conditions present. I have done some ranch supervision consulting.

Q. And is your work in the San Joaquin Valley?

A. Yes.

Q. And has it——

A. Part of it. I have been called for consultation in other parts of the State.

Q. Mr. Howard, can you give us a resume of your experience as an agriculturalist in the agricultural field?

A. I think I can, yes.

Q. Would you?

A. I was born and raised on a farm to start with, in 1913 so far as California is concerned and from 1913 to 1915 I was county agricultural inspector in this county, Fresno County. In 1915 and through 1918 I was county agricultural commissioner in Kings County. In 1919 I returned to Fresno, as grower service manager for the Sun-Maid Raisin Growers. In that capacity I was in charge of research and advisory work for the 14,000 members of that [367] cooperative organization. At that time I had supervision of a joint house organ publication between the Sun-Maid Raisin Growers and the California Peach and Fig Growers

(Testimony of Fred K. Howard.)

Cooperative, and as such I acted as adviser to those members of that cooperative who required it. In 1923 I went to the western office of the American Cyanamid Company, which is a large producer of, among other things, agricultural chemicals, insecticides, fungicides, weed killers, defoliates and fertilizer. I remained with the American Cyanamid Company until 1928, when I resigned and bought an interest in a small oil spray manufacturing or fabricating concern, Peerless Spray Chemical Company, at Covina, California. I remained there through '28 and '29, and then was requested to return to the American Cyanamid Company in charge of their entire agricultural chemicals work in the eleven western states. That was a larger opportunity so I sold out my interest and returned, and remained with the American Cyanamid Company in essentially that capacity until 1945, when they relieved me of the general administrative duties of that department and assigned me to work of Western Agriculturist, which consisted of working with research workers in the eleven western states in an effort to extend and promote the use of the chemicals which were then ready for sale, and to do research work on chemicals which were not yet in the sales category. [368]

I continued with that job until 1949, when I reached retirement age for the company, and I retired, moved to Lindsay, and for a short time I associated with my elder son who is a chemical engineer with a laboratory in Lindsay, and between



(Testimony of Fred K. Howard.)

us we did research work for other companies, that is companies not our own, in the establishment of methods of use, dosages, and so forth, of their agricultural chemicals. That continued until late 1951, and as sometimes happens, my son wanted to go in a different direction than I wanted to go, so we dissolved the partnership and since that time I have been in the position I stated first.

Q. Thank you, Mr. Howard. During this experience that you have just related, have you come in contact with, studied and done experiment and research with agricultural sprays containing oil?

A. Oh, yes.

Q. And have you studied and become familiar with various bacterial diseases, particularly of stone fruit trees?

A. Yes, I have.

Q. And virus diseases the same?

A. To some extent, virus diseases, yes.

Q. And how about fungus?

A. Yes, definitely.

Q. And have you become acquainted with the various soil and climatic conditions of various parts of the San [369] Joaquin Valley?

A. Yes, I have traveled extensively up and down, been in a wide variety of conditions in the Valley.

Q. I am referring primarily in that last question, Mr. Howard, to their effect, that is the effect of the various soil conditions and various climatic conditions on stone fruits?

A. Yes.

Q. And in particular peaches?

A. Yes.

(Testimony of Fred K. Howard.)

Q. Now tell me, Mr. Howard, insofar as the various bacterial diseases are concerned, is there any substantial difference between those diseases and their effect on peach trees in one part of the San Joaquin Valley and in another?

A. No, they are caused by the same bacterial organism, and it is like diseases in human beings. If you have the measles the germ that causes it is the same regardless.

Q. And is that true also of virus and fungus?

A. Yes, with the exception of the fact fungus diseases are more prevalent where there is more moisture, climatic conditions are a little more favorable to the development.

Q. All right. Now, Mr. Howard, I understand that in the spring of 1957 you did not see the Grimm Merrill Gem peach orchard?

A. To my knowledge I have never been in the Grimm [370] orchard at any time.

Q. At least you did not study it? A. No.

Q. For the purpose of determining any—

A. No.

Q. —causes or effects? A. No.

Q. Then, Mr. Howard, let me ask the following hypothetical question: assuming that in the year 1957 you had a peach orchard of 20 acres in the Mettler Station area of Kern County, California, consisting of approximately six acres of six year old Gold Dust peach trees, approximately six acres of six year old Blazing Gold peach trees, and approximately eight acres of four year old Merrill

(Testimony of Fred K. Howard.)

Gem peach trees; and assuming further that all of such peach trees had been grown from S-37 root stock; and that in January or February of 1957 a carry-over of spider mites from the previous year was observed, and a little bit of Parlatoria scale had appeared; assuming further that around the 26th of February the entire orchard had been irrigated, and on March 5th its condition was as follows: the Blazing Gold trees were in pink bud stage with approximately 60 per cent of the buds showing color, and the same percentage of the leaves showing green tips; the Gold Dust trees were also in pink bud stage with approximately 30 to 40 per cent of the [371] buds showing color and the same percentage of the leaves showing green tips; that the Merrill Gem trees were in swollen bud stage with approximately five per cent showing color and the same percentage of the leaves showing green tips; assuming all of the above to be true and to be the condition on March 5th, would it, in your opinion, be safe and good farmerlike practice to spray those trees with the following spray: four per cent Ortho-K flowable medium oil, two pounds of Ortho basic lead arsenate, and two pounds of Mitox wettable to each one hundred gallons of water, and to apply that spray at the rate of 400 gallons per acre?

A. I would consider it safe, yes.

Q. Can you explain to the jury what factors of what things would cause you to have that opinion?

A. I have never seen any damage to a deciduous

(Testimony of Fred K. Howard.)

tree in that stage of growth resulting from the application of a foliage type oil, which Ortho-K happens to be, at any concentration. So far as the other materials are concerned, both of them are, I believe, fairly safe when used with oil or without oil. I would have only one slight reservation, and it is not a question of injury, and that is I do not recall your mentioning any pest present which would be—would require the use of basic lead arsenate. However, I assume that was used or recommended because of the possibility of the presence of peach twig bore, for which it is used [372] commonly.

Q. Had you completed your answer?

A. I think so.

Q. Would the basic lead arsenate do any damage even if the peach twig bore was not there?

A. Oh, no; no, it would be just simply something put in there just in case it happened. It is not an expensive proposition.

Q. Mr. Howard, now assume all of the facts which we have just covered in the first question I asked you, and assume that on March 5th and 6th of 1957 the solution mentioned was applied to the orchard at the rate of 260 gallons per acre; assume that approximately a week thereafter a burning of the petals in the blossoms on the Gold Dust and Blazing Gold trees was noticed, and that approximately a week after that, or two weeks after the spraying, it was noticed that the leaves on one of the Merrill Gem trees didn't develop properly and turned yellow, and that the tree had a very un-

(Testimony of Fred K. Howard.)

healthy look; assume that this condition continued on this tree for several days and that thereafter a similar condition appeared on many of the other trees in the orchard, and that thereafter the condition of each tree grew worse day by day; that on some of the limbs which were not badly affected fruit would develop and then suddenly remain in a static condition and [372] cease growing—

A. Will you repeat that last sentence, I didn't get it all.

Q. That on some of the limbs which were not badly affected fruit would develop, or did develop and then suddenly remained in a static condition and ceased growing, so that you had all sizes of fruit and all conditions of fruit from peanut size up to walnut size or larger—or I believe Mr. Grimm said a golf ball size—and assume further that at the time the condition was first noticed, the trees had not yet advanced to the stage where a substantial amount of fruit was out, but that as time went on the trees put on leaves and did bear fruit, but that much of the fruit did not mature, and that the leaves curled and dried; assume also that there was a sour smell around any of the limbs where the bark had been damaged and the cambium layer was exposed and that the cambium layer was darker than usual; assume that this condition of sour smell, discoloration existed throughout the entire orchard wherever the condition of damage existed; and assume that later in June, or at least late in the summer, the trees began to improve, and some of them



(Testimony of Fred K. Howard.)

put out new shoots and new limbs, to where in September some of the trees were such that from casual observation you could hardly tell they had been affected; assume all of these [373] conditions to be true; and also that the adjoining Blazing Gold peach trees and the Gold Dust peach trees were entirely normal and unaffected and produced normal crops; assume all of those, in your opinion could those conditions have been caused by the application of the spray formula previously described on March 5th and 6th?           A. No.

Q. Will you tell us why?

A. Yes. I stated previously that in my opinion the spray formula was entirely safe under all conditions existing at that time. I see and can conceive of no way in which sufficient oil, regardless of what was in it, that is the other materials that were combined in the formula, that could penetrate the protective bark to the extent that it could cause that kind of damage.

Q. If oil was applied in a sufficient quantity to cause damage, what parts of the tree would be damaged?

A. The younger wood; the leaves, of course, would be affected first, assuming that the oil was an oil that could damage the leaves. The leaves first, and then the young wood, young twigs would be the damaged portion, not the older wood.

Q. And why not?

A. Because they are less protected; the older wood has a very, very substantial wrapping around



(Testimony of Fred K. Howard.)

the growing layer, [374] the bark is certainly very protective, so protective, in fact, that in the early days back in 1916, '17, '18, a common formula used on dormant deciduous trees was crude oil around ten per cent with whale oil soap to permit it to mix with water, and about two pounds of ordinary household lye, and that was sprayed on, and it was a normal, usual practice for several years.

Q. Is the wood of a peach tree any more susceptible to damage after the blossoming has begun than it is in the dormant stage?

A. It normally would be less susceptible during that period than, after the sap was coming up from below.

Q. Do I take it then, in other words, the presence of the sap in the branches would be a protection in itself?

A. Right, for this simple reason, that as we all know oil and water don't mix, and if you put oil and water together the oil always comes to the top immediately, and if that tissue, that cambium layer, the growing layer, is full of water it would act as a normal natural repellent to that oil, and would not permit it to get into the cambium layer.

Q. Mr. Howard, assuming that oil is sprayed on a tree in sufficient quantities to cause damage, when would the damage appear?

A. Well, quite rapidly.

Q. Would it be normal to expect the damage to appear [375] a week to ten days later?

A. Oh, I don't know. I have seen so little oil

(Testimony of Fred K. Howard.)

damage. I don't know that I could answer that question, but it is a contact effect, that is, it destroys the tissue and if there is anything in the oil that will do any burning it destroys the tissue when it hits and that is a very quick action. I don't know whether your question is directed towards its effect on a leaf, or with respect to its effect on a twig, which might happen if it was a herbacidal oil, one which is designed to kill such tissue.

Q. Mr. Howard, in a four-year old peach tree with approximately five major or scaffold limbs, is there any reason why some limbs would be more susceptible to oil damage than others?

A. No, none at all.

Q. Is it your opinion, in other words, that if such oil was applied to damage one limb it should damage all limbs?

A. Yes. I am assuming in that statement that the oil was put on uniformly in a workmanlike manner.

Q. Yes. Now, Mr. Howard, you have heard me read two questions which assumed certain facts, which stated certain conditions of Mr. Grimm's orchard last spring. Have you seen conditions similar to that, or similar to those conditions described in the Grimm orchard, in different locations in the San Joaquin Valley? [376]

A. I worked with a condition essentially the same, scaffold branches dying soon after spring growth started, first, I believe in 1916, in apricots in Kings County. I have seen similar conditions

(Testimony of Fred K. Howard.)

since that time at more or less infrequent intervals.

Mr. Barnard: I believe you may cross examine.

The Court: I think, gentlemen, we will take our morning recess.

Members of the jury, bear in mind the admonition I have given you. We will take a short recess.

(Short recess.)

The Court: The jury is present, gentlemen?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: All right, Mr. Hamilton.

### Cross Examination

Q. (By Mr. Hamilton): Mr. Howard, your principal field of research and work with agricultural commodities has been in the field of cotton, has it not? A. No, oh, no.

Q. It has not? A. No.

Q. Mr. Howard, you have testified in many legal proceedings, have you not? [377]

A. I have testified what?

Q. In many legal proceedings?

A. I have testified in some, I wouldn't say many.

Q. In the past year, let's put it in the calendar year 1957, in how many cases did you appear as a witness? A. I think one.

Q. And the year prior to that, sir?

A. Possibly two. I don't keep a calendar of those things.

Q. When was the date on which you retired?

A. I am trying to go back, I can't add very fast,

(Testimony of Fred K. Howard.)

or subtract very fast. I retired just about ten years ago, a little less than ten years ago, from the Cyanamid Company.

Q. And since that time you have been an agricultural consultant?

A. Except for the time that—well, I guess I was too, at the time I was in partnership with my older son, who is a chemical engineer, I have been doing that, and of course the work there was in that same field.

Q. Do you recall approximately, sir, how many actions you have testified in as a witness since your retirement?

The Court: I assume, Mr. Hamilton, you are referring to testimony as an expert?

Mr. Hamilton: Yes.

A. I presume the total is somewhere around seven, maybe seven total. I might add that two of them were as witness [378] for your partner, Mr. Conron.

Q. And how many of those cases involved cotton or potatoes?

A. Both of those involved cotton and potatoes.

Q. And of the total number of cases in which you have appeared as a witness?

A. About half of them have been cotton.

Q. Has that been as a witness for the defendant in all cases?

A. In all cases that has been for the defense.

Q. Now, you did not see the Grimm orchard?

A. No.

(Testimony of Fred K. Howard.)

Q. So far as you can recall, you have never been in the Grimm orchard?

A. That is right.

Q. You don't know in the spring of 1957, and referring to March, April or May whether there was any sour smell present in the orchard or not?

A. No, I can't smell that distance.

Q. You have no knowledge of the color of the leaves?      A. No.

Q. The appearance of the orchard in any way, shape or form?

A. Not from visual observation, no, sir.

Q. What particularly, sir, what and where and under [379] what circumstances have you investigated oil spray injury to peaches?

A. The American Cyanamid Company, with whom I spent a good many years is—was one of the two producers in the United States of a material to fumigate citrus trees. Until some of the more refined oils were used, that was an exclusive fumigation field, pest control field for the control of scale. With the advent of these foliage sprays the oil spray business became very seriously competitive, and I wish to assure you that the question of oil and oil injury to trees in foliage of any kind was quite a serious commercial matter to me and to my staff, and I honestly tried or I tried honestly to find places where these foliage oils caused damage, because it would be a very good competitive method of keeping our sales going. I might add that in the intervening years, oil spray has continued to be a

(Testimony of Fred K. Howard.)

major material for use on tree foliage, and neither the American Cyanamid Company nor DuPont Corporation, who were the other manufacturers, are now producing and selling this gas for that purpose. In other words, competitively the oil business has taken the foliage deal.

Q. But, sir, I asked you for specific instances of experimentation or investigation of oil spray injury to peaches.

A. I can't remember specific instances, no, sir.

Q. There is a disease in peaches called bacterial canker, is there not?

A. There is a disease called bacterial canker which is prevalent on stone fruits of all kinds, including peaches.

Q. And that disease is also known as bacterial gummosis?      A. Yes.

Q. The two terms refer to the same disease?

A. Yes, I think that possibly in the years gone by there have been some other designation of the disease.

Q. Now, is that an infectious disease?

A. Yes. Definitely.

Q. It is a pathogenic disease?      A. Yes.

Q. Caused by a bacteria?

A. Caused by bacteria, let us say, not a bacteria. I am not positive that anyone knows specifically a bacteria which causes the disease.

Q. Can the bacteria which causes bacterial canker be isolated and cultured?

A. I believe it can, that is the group can. As I



(Testimony of Fred K. Howard.)

repeated, I am not sure that anyone has yet succeeded in saying this is the one.

Q. Then you would not quarrel with Mr. Weigle, who made the cultures, and his statement that if bacterial canker were present he could have cultured it? [381]

A. I wouldn't quarrel with him, but I would disagree with him. I believe that his statement was that he did not find it, which is different than not being present.

Q. But he also stated he attempted to culture it?

A. Yes. May I add something here?

Q. You may, sir.

A. In 1916 in Kings County when I was commissioner, we had an outbreak of a condition in apricots, south and east of Armona, which was puzzling to me as commissioner. I asked for help. I got that help from Dr. J. T. Barrett, plant pathologist of the Citrus Experimental Station at Riverside. Dr. Barrett came to Hanford, and we spent several days, and at two or three different intervals, during that spring—I think it was the spring of 1916—and Dr. Barrett at that time was not familiar with the disease. He did not know what caused it. In the process of our investigation, surgical work, and so forth, we took small samples of the bark, small wedges of the bark from the diseased area on the trees and cut openings in apparently healthy trees and inserted those wedges to see if we could infect the healthy tree. Now, in spite of our care in select-

(Testimony of Fred K. Howard.)

ing what we thought were areas of active disease, we were not able to get 100 per cent infection as a result of that. We did get some, and that established, as far as I know, the first known outbreak of a bacterial disease of that type in the State [382] of California. Later it was learned that a similar disease had occurred in Oregon, and I have had the pleasure of talking with Dr. Barss who did the work there about his experience with it. The disease within the following year was not particularly prevalent in this orchard, and it was—there were a few limbs lost in other orchards in the area and for quite a period following that outbreak we had no more serious trouble with it. In other words, it has been called commonly a hit and run disease.

Q. This is bacterial canker you are talking about?

A. That is bacterial canker I am talking about.

Q. Mr. Howard, what is the principal vector of bacterial canker?

A. That I don't know. I do know some of the vectors. I know at least one of the vectors, that is insect carriers through blossoms. I know that, that is I believe it. It is pretty hard to say I know. I believe it because we found in many cases in this particular orchard fruit sperm on which had been bloomed with a small canker at the base of the sperm on older wood, and naturally and I think quite logically Dr. Barrett and myself assumed that it had been carried by insects visiting from blossom to blossom.

(Testimony of Fred K. Howard.)

Q. Now, you understood me, by my use of the term vector the carrier which spread the disease?

A. Yes, yes. [383]

Q. Carries it up and down the tree.

A. I would say the vector was an insect.

Q. Is it not, sir, true that the principal vector is rain and wind?

A. That is entirely possible, but I personally have no proof of that. We thought when we were working on this that the infection occurred in the late fall and during the winter, and that the disease progressed during the dormant months, otherwise it could not with new infection in the spring have spread so rapidly over the main scaffold branches.

Q. You are familiar, are you not, with Dr. E. E. Wilson's work on bacterial canker, as that appears in the Year Book of 1953?

A. I have read it.

Q. And you have no quarrel with his indication that rain is a factor?

A. No, I wouldn't question it.

Q. Now, in Kern County in 1957, what was the rainfall, do you recall?

A. No, I don't.

Q. Do you know whether it was a dry year or a wet year?

A. I have no recollection. Of only one thing I am sure, it was not as wet as this year has been.

Q. Do you have any recollection as to whether or not there was any rain in March? [384]

A. No. No, I don't.

Q. Mr. Howard, are there any varietal differ-

(Testimony of Fred K. Howard.)

ences in susceptibility among various varieties of the same kind of stone fruit to oil injury?

A. To what?

Q. Oil injury.

A. You will have—will you please define what you mean by oil injury? Are you talking now about foliage oil, or so-called dormant oil.

Q. Let's take the whole field, dormant and foliage, are certain varieties of peaches, for instance, more or less susceptible to oil injury?

A. I have no knowledge of any difference, any material differences that is true year after year.

Q. Is that same thing true as to susceptibility to bacterial canker?

A. No, I think not. My—going back again to this work with which I am very familiar, two of these varieties, the Royal and the Tilton, had at that time greater incidence of the disease than did the Blenheim variety in the orchard. Now, that doesn't establish a resistance by any matter of means for Blenheims, because there were also trees of the Royal and the Tilton which were not affected, and we have to take those things into consideration.

Q. Now, sir, the bark on peach tree wood that is two [385] years old and older, are there any openings in that bark?

A. Oh, yes, sure.

Q. There are?

A. Yes.

Q. What is the nature of those openings?

A. Well, I would call them more or less of a slit, lined with a corky substance.

Q. Those are lenticular—

(Testimony of Fred K. Howard.)

A. Well, they call them lenticels, yes, if you want the technical name for them. I was trying to avoid it.

Q. And at the area of that opening there is very little protection for the cambium layer, isn't that correct? A. Against what?

Q. Against matters that might be applied to the outside, such as oil?

A. No. It is—there is no chance, in my opinion, of oil getting in through those openings as ordinarily applied. I can conceive of your putting a piece of wood and soaking it in oil and getting some oil into the cambium; but not under ordinary cultural conditions, that is spray conditions, can I conceive of oil going into the lenticels and cambium.

Q. Then you would quarrel with Dr. Hesse's statement? A. Oh, absolutely; absolutely.

Q. Now, sir, the use of dormant oil, oil designed, manufactured for the purpose of agriculturists using them [386] for dormant spray—

A. Yes.

Q. —the use of oils of that kind and sulfur compounds in the same spray are wholly compatible, are they not? A. Yes.

Q. There is very little chance of injury from a combination of sulfur and the dormant spray oil?

A. Following the use of crude oil there was a period of years before the foliage oils were developed in which it was a common formula to use a dormant type spray oil with liquid lime sulfur.

(Testimony of Fred K. Howard.)

Thousands of gallons were used not only on deciduous but on citrus in the foliage.

Q. Now, the foliage spray oils are a more highly refined oil, are they not?

A. That is right. That is right.

Q. And foliage spray oils and the sulfur based compounds, such as lime sulfur, are wholly incompatible, are they not?

A. They are compatible, they will mix; but I would certainly advise against using those two you speak of in a foliage oil, on foliage.

Q. In the compatible chart they are listed as being non-compatible?

A. Well, you have to stretch the meaning of incompatibility. It is a question of whether you can put them together, or whether they are safe to use.

Q. My question, of course, in reference to compatibility is whether they are safe to use together?

A. I wouldn't want to use elemental sulfur on foliage with oil at any time.

Q. Such a combination is then dangerous?

A. Elemental sulfur, yes.

Mr. Hamilton: I have no further questions.

### Redirect Examination

Q. (By Mr. Barnard): Mr. Howard, I have a couple of questions. Are you familiar with the formula of a product known as Mitox?

A. I have read it. I am not an organic chemist so I can't discuss it.

Q. Are you familiar with the ingredients?



(Testimony of Fred K. Howard.)

A. Yes, it is a hydrocarbon and I believe it is a sulfite form.

Q. Is there in Mitox what is called, I believe, I am not sure, unsulfinated residue?

A. In Mitox?

Q. I am over my head, Mr. Howard.

A. You are certainly over mine.

Q. Let me ask the question this way: You just testified that you would not use sulfur,—

A. Yes.

Q. —and foliage oil together on foliage? [388]

A. Yes.

Q. Are you thinking of the same type of sulfur as is found in Mitox? A. Oh, no; no.

Q. Is there anything in the Mitox in the way of sulfur which would hesitate to use with foliage oil?

A. No. Oh, no. No, there are many materials that contain some sulfur used regularly with oil, as many or more with comparable sulfur, so-called, as Mitox contains, as far as my information is concerned.

Mr. Barnard: No further questions.

Mr. Hamilton: I have no further questions.

The Court: Do you need Mr. Howard any further?

Mr. Hamilton: He may be excused.

The Court: As far as the Court is concerned, you are excused. Next witness?

(Witness excused.)

Mr. Barnard: Mr. Ogden.

## GEORGE W. OGDEN

recalled as a witness for defendant, having been previously duly sworn, was examined and testified as follows:

## Direct Examination

Mr. Barnard: If the Court please, I have asked the reporter if she could read to me the last couple of questions before Mr. Hamilton's objection to Mr. Ogden's testimony [389] so that I can remember where we were.

The Court: Very well.

(Record read.)

Q. (By Mr. Barnard): Did you hear the last question read? And the answer? A. Yes.

Q. Did the condition in your orchard which you have described continue throughout the growing year?

A. Yes, on some of the trees. Some of them died immediately, and some of them lingered on until in the fall.

Q. Were some of them unaffected?

A. That is right.

Q. Now, Mr. Ogden, may I show you a photograph which has been marked as—

Mr. Hamilton: Your Honor, I am going to repeat my original objection. We have heard nothing so far that would change the picture of relevancy of what happened to Mr. Ogden's orchard and what happened to the Grimm orchard.

Mr. Barnard: If the Court please, Mr. Howard has testified that he is familiar with bacteria, virus, fungus diseases; he is familiar with soil conditions

(Testimony of George W. Ogden.)

and climatic conditions in the various parts of the San Joaquin Valley, and has stated as his opinion that there was no substantial difference in the way they affected peach trees in one part of the Valley from another. I submit that certainly makes [390] the testimony relevant, and that any difference or claim of difference is merely a matter of weight to be considered by the jury.

Mr. Hamilton: May it please the Court, I heard Mr. Howard say nothing to indicate that the conditions, climatically or soilwise or otherwise would be the same in the Grimm orchard as that of Mr. Ogden's orchard.

Mr. Barnard: I didn't say he said that. He said different conditions existing in the Valley would not essentially affect the appearances and the effect of the disease.

The Court: Well, I gathered the effect of his testimony was that a pathogenic disease to a tree would be the same in Fresno or Bakersfield or Oregon or most any place, just as he indicated that a person has measles in California, why, it would be the same measles, I suppose, somebody else might have. I think though I am going to sustain the objection to the question.

Mr. Hamilton: Thank you, your Honor.

Mr. Barnard: If the Court please, it is a quarter of 12:00, and I would like to make an offer of proof. Could we excuse the jury for the noon recess.

The Court: Have you any other witness that you

(Testimony of George W. Ogden.)

can put on, and you can make the offer of proof later.

Mr. Barnard: I have one more witness, but his examination [391] will be quite long, and I would rather not get barely started and then stop. He will be the last witness, your Honor.

The Court: Well, members of the jury, the Court will excuse you now for luncheon.

(Admonition to jury, and jury retires from the court room at 11:45 a.m., and the following proceedings were had outside the presence of the jury:)

The Court: Let the record show that the members of the jury have departed from the court room.

Now, Mr. Barnard, in connection with this proposed testimony, Mr. Ogden has his peach orchard in Fresno County, which is located some 150 miles away from, I assume about 150, Mettler Station.

Mr. Hamilton: It would be close.

The Court: There is no testimony in the record asserting similarity of soils between the two places. There is no testimony concerning similarity of wind, of water, rainfall, climatic conditions. There is no testimony concerning similarity between temperatures between the two areas at the same seasons of the year. Mr. Ogden has no Gem peaches.

I don't think that Mr. Howard testified that in his opinion bacterial canker caused the condition of the trees on Mr. Grimm's orchard.

Mr. Barnard: Well, it was not my purpose to

(Testimony of George W. Ogden.)

prove [392] bacterial canker caused the condition of Mr. Ogden's orchard either.

The Court: Well,—

Mr. Barnard: The purpose of the line of questioning, if the Court please, was to show that a very similar condition existed on an orchard which had not been sprayed with an oil spray in the spring of 1957 nor in the winter of 1956. We have photographs of the orchard. Mr. Ogden has partially described it, and could continue. I believe that it is certainly a matter of weight for the jury.

The Court: Well, you are going on the assumption, I assume, that here is a certain condition in Mr. Grimm's orchard, you intend to show a similar condition in Mr. Ogden's orchard. Now, are you seeking to show the same causation in each instance brought about the condition?

Mr. Barnard: If the Court please, the burden is not me to show the causation.

The Court: I realize that.

Mr. Barnard: This testimony will remove one of the factors which is different between the two orchards, and that is the application of oil.

The Court: Well, I think for the time being you can make your offer of proof, and I will give it a little further thought and study. But you make your offer of proof, what you intend to prove by Mr. Ogden. I think it is just as easy [393] to ask him the questions in connection with the offer of proof, and it will be understood that it is an offer of proof.

(Testimony of George W. Ogden.)

Mr. Barnard: Very well.

Q. Mr. Ogden, I will show you a photograph marked Defendant's Exhibit D for identification, and ask you if you recognize that?

A. Yes.

Q. And what is it?

A. Gold Dust peach tree and my son is out there. For sure identification it was taken with my son standing by the tree.

The Court: That is one of your Gold Dust trees in your orchard at Clovis?

The Witness: Yes.

The Court: When was the picture taken? Approximately?

The Witness: I imagine you will have to tell.

Mr. Barnard: The date is on here. It was in 1957. Was it in the spring of 1957?

A. Yes, spring, probably May.

Q. I show you next a photograph marked Defendant's Exhibit E for identification, and ask you if you can identify that?

A. Yes, it is another Gold Dust tree, and my tray shed in the background. [394]

Q. Was this picture also taken in the spring of 1957?

A. I believe it was taken the same day.

Q. The same day. I will show you another photograph, Mr. Ogden, Defendant's Exhibit F for identification, and ask you if you can identify that?

A. Yes, it is another Gold Dust tree, about the center of the orchard.



(Testimony of George W. Ogden.)

Q. Taken?

A. The same time. The other trees were not affected.

The Court: Are those trees in the background there of the same variety?

The Witness: Yes.

Q. (By Mr. Barnard): The trees in the background you just stated were not affected?

A. That is right.

Q. I will show you the last photograph, Mr. Ogden, marked Defendant's Exhibit G for identification, and ask if you recognize that photograph?

A. Yes, it is near where the other one was taken because the tray shed is shown in the background. You see this tree is almost dead while the others are in complete foliage.

Mr. Hamilton: May I have what variety?

The Witness: Gold Dust.

The Court: All Gold Dust, is that right? [395]

The Witness: That is right.

The Court: That is what number?

Mr. Barnard: G for identification.

Q. Mr. Ogden, the small black spots that appear on the limbs where foliage has dropped, are those peaches?

A. Small peaches, withered, still hanging on the tree.

Q. Now, Mr. Ogden, did you spray your orchard, your peach orchard, and the one in which these pictures were taken, with any oil spray of any kind in 1957, in the spring, or in the winter of 1956?

(Testimony of George W. Ogden.)

A. No, I did not.

Q. Have you ever been able to determine the cause of the condition of your trees?

A. No, I have not. It is just my assumption what caused the death.

Mr. Barnard: I believe, if the Court please, that covers the matter insofar as my offer is concerned. If the evidence is to be admitted there might be another question or two, but I think it certainly is sufficient to establish a record of the type of testimony we offer.

Mr. Hamilton: If the Court please we maintain our position on the lack of materiality and relevancy.

The Court: Do you care to ask the witness any questions?

Mr. Hamilton: The trees in the picture which you show, Mr. Ogden, did those trees die or were there limbs on them [396] that died?

A. Yes, some of them completely, and some of them partially.

Mr. Hamilton: Some of the trees depicted in the pictures died completely, and some of them parts of the tree died?

A. Yes.

Mr. Hamilton: That will be all the questions.

Mr. Barnard: Your Honor, there is one question I forgot.

Q. Mr. Ogden, do you know the root stock upon which your Gold Dust peach trees are based?

A. S-37.

(Testimony of George W. Ogden.)

The Court: I think he testified to that earlier.

Mr. Ogden, when did you irrigate in the spring of 1957, this peach orchard?

The Witness: We get our ditch water around the middle of the month, and I imagine, poor recollection, it is probably around the 12th to 15th of April.

The Court: That would be the first irrigation that season?

The Witness: Yes.

The Court: You didn't irrigate in January, February or March?

The Witness: No, sir.

The Court: All right. I will consider it a little over [397] the noon hour.

So the Court will now recess until a quarter of two, as far as this case is concerned.

(Thereupon, at 12:00 noon, a recess was taken until 1:45 o'clock p.m. of the same day.)

Afternoon Session, 2:00 p.m.

The Court: The jury is present, gentlemen?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: The Court will delay the announcement of its ruling.

Mr. Barnard: Very well. Dr. Sessions.

## DR. ALWYN C. SESSIONS

called as a witness for defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Alwyn C. Sessions.

## Direct Examination

Q. (By Mr. Barnard): Will you state your full name, please, Dr. Sessions?

A. Alwyn C. Sessions.

Q. And where do you live?

A. 530 North Circle Drive, Fresno, California.

Q. By whom are you employed, Dr. Sessions?

A. California Spray-Chemical Corporation.

Q. In what capacity?

A. Director of research and technical work in the San Joaquin Valley.

Q. For how long a period have you been so employed? [399]

A. Twenty-six years, not in the valley.

Q. Twenty-six years for the company?

A. Yes.

Q. How long in the Valley?

A. Twelve years.

Q. Will you tell the jury, Dr. Sessions, your educational experience, in higher education, above and beyond high school?

A. I have a B.S., Bachelor of Science from Utah Agricultural College in agronomy and soils. I have an M.S. from Amherst, Massachusetts in soils and chemistry. I have a Ph.D. from Rutgers,

(Testimony of Dr. Alwyn C. Sessions.)

New Jersey, in plant physiology, with minors in biochemistry and soil microbiology.

Q. Have you had any other special training in the field of agricultural science?

A. Scholastic?

Q. Scholastic or otherwise?

A. Well, since—when I got my degree I started working for California Spray on a national research fellowship by the Crawford Technical Institute, and since that time in '29, every year since then I have been involved in the spraying, my own spraying, my own self putting on experiments in research work pertaining to sprays, as to their control, and their effectiveness in killing bugs, and also their toxicity or safety toward higher plants. I have also been associated, was for ten years as assistant director of [400] research under Mr. William H. Volk, who is the father of white oils, summer oils, which are so frequently called Volk oils. Most of my work during this time, that is, the predominance of my work, has been with oil sprays, although I have several patents also in copper fungicides, wetting agents, and so forth.

The Court: Dr. Sessions, sometimes you let your voice drop when you finish a sentence. Will you keep it up, so we can all hear you?

Q. (By Mr. Barnard): During the recent years, the last 12 years that you have been in the San Joaquin Valley, Dr. Sessions, have you been concerned with various types of stone fruit trees?

A. Ever since I came to the Valley my primary

(Testimony of Dr. Alwyn C. Sessions.)

assignment has been stone fruit, and when I was in Watsonville, in charge of the research laboratory after Mr. Volk passed away, I came to the Valley working on stone fruits for some eight years before I actually moved here.

Q. Has your work in stone fruits included the testing of various types of sprays on the stone fruit trees?

A. There hasn't been a year since I got my degree that I haven't applied and tested various sprays on stone fruits, and there hasn't been a year there hasn't been oil included in those tests, not one single year, and since I have come [401] to the Valley of course I have put on my own tests.

Q. Has that included both dormant oil and summer foliage oil?

A. That has included both summer oils and your dormant spray oils.

Q. Has your experience with stone fruit trees included peach trees?

A. More than any other by far; some cots but most of it has been on peaches.

Q. Dr. Sessions, in the spring of 1957, did you have occasion to visit Mr. Charles Grimm's Merrill Gem peach orchard in Kern County?

A. Yes, I did.

Q. Can you tell us when you first visited that orchard?

A. The first time I visited the orchard was near the first of May, 5th and 9th of May, I think, somewhere in there.



(Testimony of Dr. Alwyn C. Sessions.)

Q. And what——

A. Wait a minute—April. I beg your pardon.

Q. 5th of April.

A. To the 5th or 9th of April, I think, the first time.

Q. What condition did you observe at that time?

A. Well, we went into the orchard with Mr. Grimm, and those who were with me, and we started investigating, perhaps the most complete investigation that was made up to that time. We first looked over the orchard and as we did we questioned [402] one another about every angle we could think of, asking questions of one another back and forth, to see if we could decide what it might be, and of course we took a shovel and dug a little over the surface of the roots to see if there was any discoloration, because some diseases start there. And then we would start at the base of the tree and work up with a knife, cutting little pieces of branches of the tree to see where it was brown area, water-soaked area, under the bark, and then we would go up higher, and then consideration was given as to what that might be. We cut several branches, we examined as we do other things, and to determine if possible what the trouble was.

Now, I could give you a description of the orchard. Is that included in your question? I don't remember the question.

Q. That is sufficient for that question. Let me ask you, was there discoloration in the trunks and larger limbs of the tree?

(Testimony of Dr. Alwyn C. Sessions.)

A. Yes. As we would start up with our knife, we went around cutting it off, in these branches that had the leaves that had come out after the spraying was done when the spring came and the leaves started coming out and the blossoms came out, the little fruit formed. Now the little fruit comes up here, drying up, the leaves they were drying up, and as we came up with our knives cutting along we would find [403] an area on some limbs that was very decidedly dark underneath the bark, the cambium.

Q. Were those areas water soaked?

A. They had a water soaked appearance, a brown water soaked appearance.

Q. Did they smell sour?

A. They smelled sour, in fact Mr. Fisher called my attention to the smell of it at that time, and all of us. It wasn't as heavy as it was the second time I visited it.

Q. Now, do you have anything else, Dr. Sessions, to tell us concerning the condition of the orchard upon your first visit?

A. Well, it was obvious that certain scaffold limbs as you move up, it looked like at that time like many of them were going to die, because the fruit, the little leaves on the top that had come out were withering, and this little fruit up here was not developing. Now up here there would be a limb, as has been testified, that would be normal, but this limb would not. Now, it was true, I felt, that most, the greater predominance of this was on the south

(Testimony of Dr. Alwyn C. Sessions.)

side of the trees. I think Mr. Grimm called attention to that and it seemed to be a pattern as you looked down the orchard from one way, you would see more than if you looked from the other way. And then I noticed too that it followed down the rows more—I can't tell whether [404] it is north or south, but the pattern seemed to follow down the rows the long way of the orchard, the way the water runs. I guess the spraying is done from the house down to the other end.

Q. Now, then, Dr. Sessions, when did you next visit the orchard?

A. I visited the orchard next perhaps two weeks later as I recall. I have those dates here, I think, because I looked over my testimony. April 5th and 9th. Yes, that is about that. I got here the 26th perhaps to the 4th of May.

Q. And what was the condition the second time?

A. The second time the condition had—appeared worse because here was the tree that had now come in leaf, one branch, before it was cut off, come in leaf and had the peaches growing on it, here was another on the same tree withered up, dried, leaves gone now, fallen, and peaches on a bare limb, and down below now as you cut you really got a dark area down on the big limbs, and then of course we had the smell, the odor, and it was obvious, we thought, that it may—I thought the orchard was going to look worse than it did later on.

Q. Did you visit the orchard at any other time in the future?

(Testimony of Dr. Alwyn C. Sessions.)

A. I drove past the orchard once, and went in just at the far end. I can't remember the date. I didn't go to [405] the house, I was with someone; I just pulled around and looked and noted there was spider coming in the fall. I was going to say something about it, but I don't think I ever did, along the later part of the summer. The crop had been picked. Then I visited it again, oh, I guess, three weeks ago, something like that.

Q. All right, Dr. Sessions, from your observation on your visit in early April, and your later visit in either late April or early May, was the condition which you noticed consistent with an oil injury?

A. No, it wasn't.

Q. Can you tell us why?

A. Yes, I think I can. In the first place, I think we should distinguish here in court two types of injury from oil. There is an injury we get on the leaves and the buds, which is the first injury and the one we most often see, and that occurs as has been testified when the trees are coming out in bloom or in leaf and we spray them with a heavy dormant spray oil. Now when we spray them with a heavy dormant spray oil at that time of season you are apt to drop some of the buds, and if any of them is in leaf naturally it will burn the petals with heavy dormant spray oil. Now, because of that, and if it is more severe you get some of the little twigs burning. So when we examine, when you go in and see such a thing happen, and it does happen sometimes, [406] then we start always, start up the little

(Testimony of Dr. Alwyn C. Sessions.)

twigs to see how far down the tree the oil burned. Now, that is logical if you will think through because we are applying a chemical from the outside, it is burning from the outside in, and not coming up as disease at all from the inside plugging the tissues of the inside of the tree up, and when it is from the inside up and plugging the tissue then of course you don't kill those buds when they come out and bloom. Never in my life have I seen twigs or limbs as big as my wrists or bigger, like these are, and yet see fruit on that same limb, see buds come into leaf, see blossoms develop, see fruit form, and then have enough oil to kill the bottom. In fact, you couldn't possibly kill the bottom of these trees with a spray oil even at 25 per cent applied at the time you did, even with a dormant oil. If we could, just think, if we could have had something we could spray four gallons to a hundred, 400 gallons to an acre, four gallons of spray, and kill big trees like this, we would have the best herbicide in all the world, there is nothing equal to it.

Q. Dr. Sessions, were you able from your observations of the Grimm orchard in April and early May of 1957, to reach a conclusion as to what the cause of the condition was?

A. When I first went into the orchard, naturally it is not what I think immediately, it is what the facts are, and [407] so I went into the orchard and the time we first went in I was very reserved to say what it was, because I naturally—I wanted to take Mr. Grimm along with my thinking. So when we



(Testimony of Dr. Alwyn C. Sessions.)

came out of the orchard that time, I visited another orchard in the area to see—these diseases are the same wherever they are. We get a spray burn in Florida today on peaches, it will be the same type of thing we get here. If the disease is bacterial disease and will hit in one state it is the same here. And so I looked over the orchards in this Valley, and I had previously been associated very closely with a disease which looked very much like this. The star witness you may say that is the orchard at Atwater at the experimental station where I have carried on experiments and where I am carrying on this.

Mr. Hamilton: I am going to object to Dr. Sessions comparing other orchards with the Grimm orchard, orchards of unknown type, we don't know what kind of peach they are, we know nothing about the characteristics or similarity of the trees in the orchard.

The Court: It wasn't clear in my mind the witness was going into comparisons. I thought it was part of his investigation and examination. Read the question, Miss Schulke.

(Question read.)

Mr. Hamilton: I will make the further observation the witness' answer is not responsive to the question. [408]

The Court: I think that is true.

Q. (By Mr. Barnard): Dr. Sessions, will you confine your answer to this particular question to a yes or no.



(Testimony of Dr. Alwyn C. Sessions.)

A. Then you have to state the question as to the date I was in the orchard. The question was involved; my answer was a little involved.

Q. My question is, Doctor, whether or not during your visits, your two visits to the Grimm orchard in early April of 1957 and your second visit in either late April or early May, 1957, from your observations of that orchard you were able to reach a conclusion in your own mind as to the cause of the condition?

A. No, not definitely the cause. I was sure it wasn't oil burning.

Q. Very well. Now, are you acquainted with a disease commonly known as bacterial canker?

A. Yes, I am.

Q. Have you done any research or studying or experimentation in connection with that disease?

A. Yes, I have.

Q. Does it occur elsewhere other than in the State of California?

A. It occurs in England, it occurs throughout the United States, in most of the stone fruit areas, northwest, [409] and is becoming more serious in California. It is particularly abundant along the Pacific Coast in our states.

Q. Does it occur in all types of climatic conditions?

A. Yes, if you say all types, the types that would grow stone fruits.

Q. Does it occur in areas where stone fruits are being grown with all types of soil conditions?

(Testimony of Dr. Alwyn C. Sessions.)

A. Yes, I have seen it on some of the heaviest soils in Modesto, up near the eastern mountains, I have seen it in some of the sandiest soils we have, right at Atwater and also at Clovis, and I have it in the Grimm orchard which is rather sandy loam soil so it would be classified.

Q. Does the disease bacterial canker also appear, regardless of the particular agricultural practices that have been carried on in the particular orchard, and by that may I explain myself? I am referring to irrigation, cultivation and things of that type.

A. If we over-irrigate in the winter time and the trees are—roots are in water it is like all the other bacterial diseases that stimulates bacterial growth, and under those conditions, especially in the spring following a fall of that type we have apparently more of this disease, this type of disease, and that has occurred, sometimes we call it sour sap when the water flows over the trees, and it is given many—several names, this type of disease.

Q. Now, you are familiar, are you not, with the soils in the Clovis area?

A. I am fairly well familiar.

Q. And in particular the soils on Mr. Ogden's ranch?

A. I have been over Mr. Ogden's ranch several times. I have never actually seen a soil survey, if I may say that, where we determine the classification and the soil survey like we used to make the soil, U. S. survey.

(Testimony of Dr. Alwyn C. Sessions.)

Q. And are you familiar with the soil conditions in other peach growing areas of Fresno County?

A. As familiar as anyone would be that didn't actually I think make the survey, or have—I don't mean a chemical analysis, I mean a soil survey.

Q. Are you familiar with the soil conditions in Mr. Grimm's orchard?

A. To what I could see by digging with a shovel, by walking over it, by pulling up weeds, to see if I could see certain things. I never was able to pull a tree out, that was too deep, but in order to get a picture of it I was able to have some samples taken down to 12 feet.

Q. Now, in your opinion, would there be any substantial difference in the effect of bacterial canker upon an orchard in the peach growing area of Fresno County and Mr. Grimm's orchard, because of varying soil conditions and climatic conditions? [411]

A. Well, if there was we couldn't identify something in Bakersfield with something in England or some other place. There is nothing.

Q. Now, Dr. Sessions, you are familiar with the product known as Mitox? A. I am.

Q. Is there any metallic sulfur in Mitox?

A. There is absolutely none.

Q. Is there any danger because of sulfur in using Mitox with a foliage oil?

Mr. Hamilton: I am going to object on the basis that it would be an opinion and conclusion of the

(Testimony of Dr. Alwyn C. Sessions.)

witness who being a chemist is not qualified to give.

The Court: Well, I will overrule the objection to the question.

The Witness: There is—you will have to ask the question over.

The Court: Read the question.

(Question read.)

A. There is no elemental sulfur in it; there is no danger; it is not around, it doesn't exist.

Q. (By Mr. Barnard): Can you explain that answer?

A. Yes, I think I can. Metallic sulfur or elemental sulfur, as they call it, is quite different than the sulfur [412] when it is combined in a molecule. For instance, and I can say we have to go from the known to the unknown, if I add common salt here and you say sodium is in it and sodium is lye I would have to say yes. Now, if you say metallic sodium I say no, because it is hooked with chlorine to form common salt. Now, in these organic chemicals we don't take the elemental sulfur, it usually comes from a salt, you see we have copper sulfate, we use that in a spray, we never think of it as sulfur, you see it is the radical but not the elemental. Now when we take that sulfur and combine it with the organic chemicals I could list—I have listed here most of our organic chemicals, add sulfur, we use for spray, and this radical sulfur combines the sulfur and when we hook them together it is exactly like we hook sodium, lye,

(Testimony of Dr. Alwyn C. Sessions.)

chlorine and hook them together, there is no metallic sodium; neither is there metallic sulfur. Most of the organic chemicals that we have with our sprays today are—do carry this combined sulfur. Nicotine sulfate, same thing, it is combined sulfur. I could name many of them. I listed them somewhere if you wish them.

Q. Now, Dr. Sessions, if an oil spray was applied to a peach tree in a sufficient quantity to damage the tree, would it be normal to expect to find one or two limbs on that tree damaged, or would the whole tree be damaged?

A. When we spray a tree as Mr. Grimm has testified, [413] the sprayer,—the best way to spray is the way he did. The sprayer goes ahead with 50 foot hose and the man walks around, and sprays, and you watch to see that every limb is wet equally. Now, when we have injury with the spray we not only get uniform injury to the tree, but we get uniform injury—if we did get injury—and when I say injury I mean again from a dormant oil, because you wouldn't ever see this on summer oil, but if we put heavy enough dormant oil to get injury we either see the whole orchard—I guess he sprayed the whole orchard, we usually do not, where we see the injury, the type of injury, if I may say, it is like some man who puts the agitator to work—now, I don't know, maybe I am going too far with this, but if the agitator did the work and then you had the oil all coming out, maybe 15 gallons, we would see it, at the end of every

(Testimony of Dr. Alwyn C. Sessions.)

time you would find, or sometimes the sprayer, they dump the oil in first, start the engine, shoot the oil out in the hose, out here, heavy dormant oil, and then they put the water in the tank and start the agitator, and the first trees they spray from the tank, the first hundred—no, not a hundred, 20 trees down the row you see 20 trees, you would see that, and you told them not to put the oil in if it was a heavy dormant oil until some water got in the tank. Now, I have seen that kind of injury.

Now, of course I have produced this many, many times, [414] this type of injury, but it is always uniform around the tree.

Q. Dr. Sessions, have you examined and are you familiar with the chart which is identified as Plaintiff's Exhibit No. 1?

A. I sit at the back, I have noticed the chart as I walked up here. I am not sure as to the actual directions on that. Now, I know that the Xs represent trees that are not hurt; one under the X represents one scaffold limb, two represents two scaffold limbs, three represents three scaffold limbs, and you have got some Ss there which are stumps, I think.

Q. Now, Dr. Sessions, for your information, the top of the chart is north.

A. The top is north. Now, that is confusing, I wonder if we could have depicted where the house is? What corner is the house?

Mr. Hamilton: I would be happy to point out



(Testimony of Dr. Alwyn C. Sessions.)

to Dr. Sessions, that the house sets, I believe, approximately in the center of the orchard, over on the right hand side, probably 40 yards (indicating).

The Witness: Then would the road be along the bottom of this map, the cement road, macadamized road?

Mr. Hamilton: This is the southerly side. The road would be here. [415]

The Witness: That is good. Now ask your question. I am acquainted with that orchard now.

Q. (By Mr. Barnard): Dr. Sessions, do you see, examining that orchard, any pattern which is at all consistent with any spray injury?

A. No, that chart proves conclusively to me it couldn't be a spray injury. I could tell you the reason if you wish.

Q. Will you tell us why?

A. If this was a spray injury, and I take it they start at the house end and go down through the rows, that is normally the way it would be, if it was a spray injury it would—with a heavy dormant oil again, the spray injury would have been on the blossom—I mean the blossoms wouldn't have come out, the buds would have dropped, the twigs, the little twigs would have been injured, and you would have uniform injury clear down on each row. Now, if you look there on the chart, for instance, I was just noticing a minute ago, one of those, about the third row from the top, we move along, we get a few there at the first part and then the whole row

(Testimony of Dr. Alwyn C. Sessions.)

has nothing. Now, that is about four tanks of spray, spraying at the time, and if you go this way you will find out this way practically every row has some, the bottom row has, the outside row, but if you start down this way there is no correlation at all. [416]

Q. So we can keep this in the record, Doctor, the first "this way" that you refer to——

A. Was east and west, the first would be down the long ways of the rows, now that is the way the water runs and that is the way we spray. Now you look down the long way of the rows and see how inconsistent it is for uniformity, some rows have no injury, sprayed with the same spray, same men put it on, one tree not burned, the other is, uniform in every respect. Now then, if you think of it as some trouble that carried by the wind, or rain, or irrigation water, they go this way, long way of the row, that is consistent. But it is certainly not consistent with any spray burn in any way.

Q. Dr. Sessions, a while ago in answer to one of my questions, you stated that there were two types of oil and you started to discuss the possible oil injury from the dormant type of oil. I may be wrong, but I don't recall that you completed the answer and that you discussed what possible injury could be done by a summer foliage oil.

A. I wonder if I may have a sample of our dormant oil, and if permissible, and our summer oil. I don't care whether it is in evidence or not.

(Testimony of Dr. Alwyn C. Sessions.)

Mr. Barnard: Well, the Court does. I will ask the Clerk to mark it.

Q. First, Dr. Sessions, I will hand you a bottle which [417] has been marked Defendant's Exhibit H for identification. Do you know what that is?

A. I do.

Q. What is it?

A. It is the oil from which clean-up, a dormant oil of Cal-Spray is made.

Mr. Hamilton: Counsel, I didn't get that exhibit number.

Mr. Barnard: H. We offer this in evidence at this time.

The Witness: May I make a note here?

The Court: It will be received and marked Defendant's Exhibit H in evidence.

(The bottle referred to was marked as Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. Barnard): Dr. Sessions, I will hand you Defendant's Exhibit B, which is the light summer oil, that is the oil that goes into the light summer oil, and Defendant's Exhibit H, and—

A. The question is how these were made and what makes the actual difference, or what was it?

Q. No, my question was that I believe you failed to complete your answer to an earlier question and explain to the jury what type of injury, if any, could be expected or inflicted upon a peach tree by the oil, Defendant's Exhibit B, the summer oil. [418]

(Testimony of Dr. Alwyn C. Sessions.)

A. This oil is a light oil, the same nature of the oil we have in cold creams, hair tonics, and all sorts of white oil. It is known as a white oil, we call it in spray a foliage oil. Now, a foliage oil is not normally used in the dormant period because it is too expensive. It is safe but it is too expensive. Now, this oil——

Q. You are referring to Defendant's——

A. Clean-up oil, the dormant, heavy dormant oil, is not refined as this is. Now, when this is applied in the dormant it will control the bugs, but this doesn't have the sulfinated residue this does.

The Court: I think, Mr. Barnard, instead of "this" and "this" you better have it identified.

The Witness: All right, the white oil doesn't carry the sulfinated resident.

Q. (By Mr. Barnard): You are referring to Defendant's Exhibit B?

A. Exhibit B doesn't have the sulfinatable residues in it that this dormant oil, Exhibit H, has.

Q. Now,——

A. Now, when we apply this oil can be absorbed in the tissue of the plant, can be absorbed until, you can concentrate it until you get into the tissue of the bean plant, I don't know which——

The Court: Which one are you referring to?

The Witness: The highly refined.

The Court: No, the exhibit number.

The Witness: Exhibit No. B. This of course, if you put this on a leaf, the next morning you would have a leaf actually caustically burned.

(Testimony of Dr. Alwyn C. Sessions.)

The Court: That is——

The Witness: That is clean-up, H.

Q. (By Mr. Barnard): That is Exhibit H. Now, Dr. Sessions, if you applied the foliage oil, which is Exhibit B, to an opened or opening bud on a peach tree what would happen?

A. I don't know whether it is permissible or not. I have this oil applied several years ago on leaves of a bean plant to show it moving out for 46 days and then photographed as it moved through and showed no injury. Now, if you put this on a bud as it emerges, four per cent, there would be no injury whatever. This is volitable, as the day warms up some dries up, the lighter oil, some goes through the plant as the plant grows and you would have no injury here, to say nothing of the limb. That is Exhibit B.

Q. In your opinion, would it be physically possible to apply enough oil of the type of Exhibit B to a Merrill Gem peach tree to damage the scaffold limbs and the trunk of that tree?

A. Yes, I could. I have seen it done on citrus. We [420] took a white oil similar to this, a little lighter, in the Riverside Experiment Station, sprayed with 10 to 15 gallons per hundred, 15 to 2000 gallons per acre—that seems like a heavy spray but it is not excessive as to citrus, completely wilting of citrus. The spray runs down the trees and after continuation of that for two years, probably putting on a total of four sprays, five sprays, they found that the roots where this

(Testimony of Dr. Alwyn C. Sessions.)

was accumulating, the roots were being hurt. There wasn't a killing of the scaffold limbs, but there was a decrease in the vigor of the tree, and so they had to quit the light oils, refined oils, and come back to lower dosages of some of this type of Exhibit B, which is used in citrus on foliage. When you say any concentration any way, you could hurt a tree most anything will if you put too much too often.

Q. Doctor, at a concentration of four per cent, that is four gallons per 100 of Exhibit B——

A. Could you injure?

Q. ——could you injure the scaffold limbs and trunk?

A. It would be absolutely impossible with one spray to do it.

Q. Have you tried, Doctor, to injure a peach tree with a spray of the type of oil of Exhibit B.

A. Both Exhibit B and Exhibit H many times. And recently, this spring, for instance, I have gone out and [421] applied this, and applied this, to peach trees.

Q. And by this——

A. Exhibit A and Exhibit B—Exhibit B and Exhibit H.

Q. Now, as I understood your answer this spray you applied was Exhibit B and Exhibit H?

A. That is right.

Q. To peach trees, at a four per cent concentration?

A. Four per cent, and more than once on the same tree.



(Testimony of Dr. Alwyn C. Sessions.)

Q. How many times did you spray the same tree?

A. With this one we sprayed twice—oh, I beg your pardon, with H Exhibit, clean-up, we sprayed twice, once of course and twice, and with this one I sprayed twice, with this one, but only one tree twice, because I knew what would happen.

Q. And you are referring now——

A. Light summer oil, Exhibit B.

Q. Did any damage result?

A. In neither case. I have the pictures showing the time it was sprayed in full bloom. I have the pictures taken day before yesterday, if it is permissible to show.

Mr. Barnard: Could we approach the bench, your Honor?

(The following proceedings were had at the bench, outside the hearing of the jury:)

Mr. Barnard: As I told you before those trees are in Fresno County, and I don't want to offer the pictures without [422] the Court's permission.

The Court: I think this, for the purpose of his statement, applying the two types of oil they showed no damage, I think that would be proper.

Mr. Barnard: How about the pictures of the other orchard?

The Court: As I originally indicated, yes.

Mr. Barnard: Very well.

(The following proceedings were had in the hearing of the jury:)

Q. (By Mr. Barnard): Dr. Sessions, you stated

(Testimony of Dr. Alwyn C. Sessions.)

that you had a picture—I am not sure whether you said a picture, or pictures—of the tree which you sprayed this spring with the oil which is designated here as Defendant's Exhibit B.

A. I hope I have them. I had them this morning.

Q. May I have them, please.

A. This is a series of pictures, I think; yes.

Mr. Barnard: I hand the Clerk a series of seven photographs and ask that they be marked for identification.

The Court: Let's mark them as one exhibit, what number would that be?

The Clerk: The next will be I.

The Court: Defendant's Exhibit I, A, B, C, D and so forth, until you have consumed the seven, for identification. As I understand, they relate to pictures of the tree Dr. [423] Sessions testified that he experimented with in the use of the dormant oil, and the foliage oil, is that right?

Q. (By Mr. Barnard): Is that correct, Dr. Sessions?

A. Some of the pictures are sprayed with both, and some are sprayed with one. I would have to identify the pictures in order to tell you how they were sprayed.

Q. But you can do so? A. Oh, yes, I can.

Q. Dr. Sessions, I will hand you Defendant's Exhibit I, which consists of seven photographs which are numbered I-1 through I-7 for identifica-

(Testimony of Dr. Alwyn C. Sessions.)

tion. Could you perhaps take just a moment and segregate those into chronological order.

A. I think that is the way they should be. This can go over here with this one.

Q. All right. Now, Dr. Sessions, you stated, I believe, that those pictures showed various stages——

A. That is true.

Q. ——of the trees that you sprayed this spring. Will you hand me then——

The Court: The stage of bloom?

The Witness: Development of the tree.

Q. (By Mr. Barnard): Those were over a period of how long a time?

A. The first spray was applied as dormant when they were— [424] February 14th, just a little—couldn't hardly call it pink, full pink stage, very few leaves out.

Q. Then was the——

A. Now the other spray that followed on top of these was sprayed March 25th, when many of the blossoms were in bloom.

Q. Doctor, we will go into the details of each picture later. When was the last picture taken?

A. The last picture was taken yesterday morning.

Q. Yesterday morning, April 10th.

A. April 10th, all right.

Q. Will you hand me the first picture?

A. Let's take this one here first. This is the second time. This is the stage of the peach when

(Testimony of Dr. Alwyn C. Sessions.)

the first spray was applied, the spray was a dormant spray, the H Exhibit.

Q. Very well. A. Four per cent.

The Court: Which one is that, I what?

Q. (By Mr. Barnard): You are referring to I-7?

A. That is the condition of the tree close-up so you see the condition of the blooms on these branches.

Mr. Barnard: Very well. Your Honor, shall I offer these one at a time.

The Court: No, I think it will probably be better to [425] put them all in at once.

Q. (By Mr. Barnard): Then, Doctor,—

A. This is the next one that was sprayed. Now, this tree has been sprayed twice, once with the aeromite Mitox, lead and oil as the Grimm was, and then some two weeks later come back and put it on again, but the first time it was sprayed with the heavy dormant oil. It was difficult to find an orchard that was not sprayed, so we went ahead and did it, twice.

Q. You are referring to Exhibit I-1?

A. That is right. Now, as to whether there was injury, this shows what the tree is today, if you have any scaffold limbs on there dead.

Q. This is I-2? A. I-2.

Q. Is this the picture that was taken yesterday?

A. That is the picture that was taken and that is the man that did the spraying standing beside it.

(Testimony of Dr. Alwyn C. Sessions.)

Q. And is this the same tree?

A. The same tree, you can identify it.

Q. All right. Now, referring to I-5.

A. I-5, that is a tree that is sprayed in full bloom, with the same combination that Mr. Grimm used.

Q. And I-4? [426]

A. That is the same tree at it appears today. I wish I could get a close-up to show you the fruit.

Q. What is I-3?

A. I-3, this is the one—this is the tree that was sprayed, at the time of the spraying you will notice the leaves are all out; that tree——

Q. I-6?

A. I-6, was sprayed about two weeks ago with the same thing, when the leaves were out, and the fruit was on the tree, that would be two weeks ago.

Q. What was I-3?

A. That is a duplication of the other where we sprayed in the full bloom. Every other tree along there is sprayed in the full bloom, and that is as the tree looks today.

Mr. Barnard: If the Court please, I offer Defendant's Exhibit I-1 through I-7 in evidence.

The Court: It will be received and so marked; received for the purpose of showing the experiments conducted by Dr. Sessions with respect to the two types of oil sprays.

Mr. Barnard: That is correct.

(The pictures referred to were marked as

(Testimony of Dr. Alwyn C. Sessions.)

Defendant's Exhibit I-1 to I-7, inclusive, and were received in evidence.)

Mr. Barnard: If your Honor please, I have completed my direct examination. I would like to show these to the jury. [427]

The Court: All right.

Mr. Barnard: Perhaps we could divide them up by rows.

(Exhibits passed to the jury.)

#### Cross Examination

Mr. Barnard: As I stated, I am through with my direct examination.

Q. (By Mr. Hamilton): Dr. Sessions, do you work under Robert K. Thompson?

A. Yes, he is in charge of the field men throughout the western United States, and I am stationed here at Fresno.

Q. You were at the Grimm ranch on how many occasions, sir, investigating this orchard?

A. Investigating the orchard three different occasions.

Q. Was that in the spring of 1957?

A. Twice in the spring of 1957, and once about three weeks ago.

Q. At any time did Mr. Grimm fail to cooperate with you?

A. No, not with me personally, except the last time I was with him, when the other men were there, I said I would like to see the roots of these trees and deeper down and see it, and I could see



(Testimony of Dr. Alwyn C. Sessions.)

or felt from the answer that he gave that he wasn't going to pull those trees out, not yet, so I went into other orchards and pulled trees out from other orchards.

Q. When you made the first visit down there, Dr. [428] Sessions, and after you had completed your examination, were you baffled at the cause of the condition of the orchard?

A. Yes, that was a very severe case of this disease.

Q. Did you have any suspicion of what it might be? A. Yes, a very strong suspicion.

Q. You referred to "this disease"?

A. To that disease.

Q. And what do you mean?

A. A bacterial type of disease.

Q. Bacterial canker?

A. It would be hard to say exactly bacterial canker. I don't think I was absolutely sure it was that. There are four or five of those bacterial diseases, fuzeium wilt, oak root fungus, and then there is a large—what we call sour sap diseases, some of them we call gummosis. So you see, it is—we knew it was in the bacterial range, but which one I wouldn't say.

Q. At no time, sir, did you ever take any material, any representative samples of the diseased material, from the Grimm orchard for laboratory examination, did you?

A. I felt, and I have always felt, the best thing

(Testimony of Dr. Alwyn C. Sessions.)

to do is to look at the orchard and see the man, rather than take the samples.

Q. You don't go for all the folderol Dr. Weigle went through, taking samples and making cultures to find out [429] with—— A. No, I——

Q. ——pathological certainty——

A. ——say no man can sit in a laboratory and have a sample sent to him and designate exactly what bacterial disease is hitting the tree. Now, they testified they didn't find the bacteria disease in that.

Q. When Dr. Wilson, the old master of the disease since 1929—— A. All right, said what?

Q. ——spent nine years at it, and——

A. I am pointing out,——

The Court: Now, just a minute. You both can't talk at once. Dr. Sessions, let the counsel complete his question. When he has finished then you can answer.

Q. (By Mr. Hamilton): ——had before him a representative sample as selected by Mr. Hench, and detected no infectious disease.

The Court: Now, what was your question?

Mr. Hamilton: That was the question. The question was, you disagreed with him?

A. No, I don't disagree with him. First place, he didn't know where the sample came from, and in the next place he knows as well as I do that oftentimes samples are sent and you cannot find these bacterial diseases when the sample is [430] sent in. It is not that simple or we wouldn't be work-

(Testimony of Dr. Alwyn C. Sessions.)

ing all this time to identify these diseases all over the United States. Let me show you the picture of what happened at Atwater, I could prove that.

Q. Dr. Sessions, did I understand you correctly to state that you took the light oil, represented by Defendant's Exhibit B, and placed that oil on a tender bean plant?

A. I did, concentrated, dropped concentrated oil on a tender bean plant leaf.

Q. So much on there that you could photograph it?

A. So much I could photograph it going through the leaves. Would you like to see them?

The Court: Now, just a moment, Dr. Sessions. You just answer the question, don't volunteer. If counsel wants to ask further questions he will, and if Mr. Barnard feels that he should ask questions, he will ask them.

Q. (By Mr. Hamilton): Without any damage to that plant?

A. Without any caustic burn or damage to that leaf, as we think of burning. I will have to explain that.

Q. Was there damage to the plant?

A. No. No.

Q. Was there any kind of damage?

A. Not what you think of damage. You ask what it was and I can tell you. [431]

Q. I understand it is your opinion that this oil could be sprayed on plants without regard to the quantity and it wouldn't injure them?

(Testimony of Dr. Alwyn C. Sessions.)

A. Now, now.

The Court: Just a minute. What oil are you referring to?

Mr. Hamilton: I was referring to the oil represented by Defendant's Exhibit B.

A. No, I never made such a statement in regard to the quantity, that would mean pouring it on any way.

Q. (By Mr. Hamilton): Would you say a 40 per cent mixture could be applied to peach trees without damage?

A. I said a spray carrying 40 per cent could be applied to a peach tree, that would be a mixture of half water with half oil, could be applied to a peach tree at the concentration Mr. Grimm put on, and it wouldn't kill the scaffold limbs and leave stumps in the orchard.

Q. But it would cause damage?

A. Yes, if there was any blossoms it would drop them, the tender twigs may be damaged with it.

Q. Then it is your understanding of that oil injury it occurs on the young wood, one year old and less, to the exclusion of the two year old and older wood?

A. Absolutely always, that is where we get our burn first. [432]

Q. I show you, Dr. Sessions, a picture marked and entered as Defendant's Exhibit I-1. Is that tree being sprayed with light oil, or dormant oil?

A. That tree is being sprayed with the same

(Testimony of Dr. Alwyn C. Sessions.)

combination Mr. Grimm sprayed his orchard with, a few weeks after it had received a full spray of dormant oil.

Q. Now, I ask you, sir, if you could, was that tree being sprayed with a light oil?

A. That tree was being sprayed with a light oil, summer oil, and the Mitox and the lead arsenate.

Q. What kind of a tree is it?

A. That is a peach tree.

Q. What variety?

A. The variety is Alberta, early Alberta.

Q. What age?

A. About a four year old tree.

Q. Located where?

A. Located on Temperance Avenue just north—just south of Butler, on Mr. Steinhauser's—in Mr. Steinhauser's peach orchard.

Q. Do I understand correctly, Dr. Sessions, that Defendant's Exhibit I-1, I-2 and I-7 are all of the same tree?

A. No. No, these two are the same tree.

The Court: Now which. Identify them.

The Witness: You read them. [433]

Q. (By Mr. Hamilton): Defendant's I-1 and I-2.

A. This tree as to showing how far it is in bloom, the blossoms are off the same tree he is holding.

The Court: What number is that.

The Witness: That is J-I. The blossoms——

(Testimony of Dr. Alwyn C. Sessions.)

The Court: Just a moment. It is what?

The Witness: J——

Q. (By Mr. Hamilton): I-7. Now, what kind of a tree is that?

A. This is still the—the blossoms he takes in his hand is off the tree I sprayed. The other is off another tree alongside of this tree.

Q. Do you know what variety that is?

A. Yes, this is a late Alberta. Now, the reason I did that is to show conclusively that there was even the later tree, was out in bloom, but not as far. The early Alberta, is the mother, I think, of the Merrill Gem.

Q. The Merrill Gem is a distinct variety of peach? A. Sure. It is——

The Court: I didn't hear.

The Witness: It comes from other varieties, of course. You don't pick it out of the air.

Q. (By Mr. Hamilton): I show you a picture marked or entered as Defendant's [434] Exhibit I-5, Dr. Sessions. What variety of peach tree is that? A. That is not a peach tree.

Q. What variety of tree is it?

A. That is a plum tree that is normally thought to be very sensitive to oil.

Q. Was it sprayed with a light oil?

A. That was sprayed with a light oil in the full bloom and you have the other pictures, it shows the complete picture, there was a little browning of the petals.



(Testimony of Dr. Alwyn C. Sessions.)

Q. Then the tree depicted in Defendant's Exhibit I-4 is also a plum tree?

A. That is the plum tree, one of the most sensitive for oil we have.

Q. The tree depicted in Defendant's Exhibit I-3, what kind of tree is that?

A. That is a plum tree. Every other one was sprayed in full bloom.

Q. Those are plums? A. Those are plums.

Q. And the tree depicted in Defendant's Exhibit I-6. A. That is a peach tree.

Q. Of what variety?

A. That is a peach tree of a Guam variety, at least that is what I am told it was. I couldn't testify to it. [435]

Q. Did you conduct these experiments for the purpose of using the results here?

A. That is the only reason I put them, because I have done it so many times it seemed foolish to do.

Q. And you used plum trees, Albert peaches——

A. I used plum trees, plum trees were in full bloom, and I used these others because we knew that they were in full bloom, they were there, they had no oil on them, they were in full blossom, they had been sprayed once. I wanted to show we could put another oil on top, and that is why I used them. I didn't know whether they were going to be used or not, I will be honest with you there, but I took some pictures.

(Testimony of Dr. Alwyn C. Sessions.)

Q. Dr. Sessions, of your foliage oils, your company sells various grades, does it not?

A. Yes, oil——

Q. Medium? A. Medium.

Q. Medium light? A. Light medium.

Q. Light medium. Light? A. Light.

Q. And the medium is the heavier of——

A. No.

Q. ——the foliage oils? [436]

A. No, there are several that are heavier. The bulk oils are heavier, and medium heavy is heavier.

Q. In other words, there are further degrees of—— A. Heavy.

Q. ——viscosity? A. Correct.

Q. But the trees depicted in your experiments were sprayed with the use of light oil?

Q. The bulk medium, which is what we call the light oil against the clean-up oil.

Q. You have referred to the light oil all during your testimony. A. The light oil——

The Court: Just a minute, don't be talking at once. Ask your question.

Q. (By Mr. Hamilton): The oil sold to Mr. Grimm was a medium oil.

A. Correct, but it compares with the two samples I had on my hands, Exhibit B and Exhibit H, and then we compared those two, I would say the light oil, because it is much lighter than the heavy dormant oil. Now, even so, medium oil stands between the heavy—we have heavy white oil and we have lighter white oil. Now, of course,

(Testimony of Dr. Alwyn C. Sessions.)

the oils are used more extensively than any other spray, and so we have this whole field to fit over all the characteristics [437] in the agricultural spray industry.

Q. Dr. Sessions, in the spring of 1957, the formula four per cent Ortho-K medium oil, four pounds lead arsenate, and two pounds of Mitox per 100 gallons of water, was that a standard formula widely used in the San Joaquin Valley.

A. May I ask it this way: it had been used in England five years.

The Court: No, I think——

The Witness: All right, then I will say, what do you mean by standard. Let me get that.

Q. (By Mr. Hamilton): Was it a commonly used formula?

A. Not too extensively because we couldn't get it. It was on our spray programs, we recommended it.

Q. It was relatively new?

A. What is it?

Q. It was relatively new?

A. If being discovered five years before was new.

Q. Now, this spray formula, was it one that was generally recommended for use in peach orchards?

A. It is, there is where it is predominantly used and being used now.

Q. No, I am talking about 1957.

A. Let me ask you this question: do you mean

(Testimony of Dr. Alwyn C. Sessions.)

predominantly used by the amount of Mitox that was manufactured, [438] or whether the majority of orchards in this Valley was sprayed with it?

Q. Sir, I am not talking about Mitox. I am talking about the formula recommended to Mr. Grimm, four per cent medium oil, four pounds of basic lead arsenate, and two pounds of Mitox, used in 100 gallons of water, as a spray on peach orchards. The question, if I may repeat it, in the spring of 1957, was this particular mixture or formula one that was generally recommended for use on peach orchards? A. Where?

Q. In the San Joaquin Valley.

A. North of Bakersfield, we would be included in that clean-up. In Bakersfield, I wouldn't say most, but a large number of the growers used the Ortho-K medium, other than that.

Q. Would it be possible to give a yes or no answer to my question, Dr. Sessions?

A. If you will define it. When you say generally, it is quite a large thing, must be generally over all the orchards, no, not with Mitox in it. Generally with an oil spray of some kind, yes. With lead arsenate, yes.

Mr. Hamilton: Counsel referring to page 47, line 11.

Q. You remember, Dr. Sessions, when your deposition was taken.

The Court: Just a minute, Mr. Hamilton. Don't carry on a private conversation with the witness. Speak out. [439]

(Testimony of Dr. Alwyn C. Sessions.)

Q. (By Mr. Hamilton): Do you remember, Dr. Sessions, when your deposition was taken?

A. I do.

Q. You were under oath?

A. I was under oath.

Q. Would you read on page 47, commencing with line 11——

A. Line 11.

Q. ——through line 16. Now, read it to yourself.

A. How far down?

Q. From line 11 to line 16.

A. Yes. That is my testimony.

Q. Now, will you go back to page 46, to line 22.

A. Wait just a moment, now. The testimony I gave today. Line what?

The Court: 22.

Mr. Hamilton: Page 46.

The Witness: To myself?

Mr. Hamilton: Yes, and read from there down to where you started in, line 11 on page 47.

The Witness: I have read it.

Q. (By Mr. Hamilton): Do you recall being asked those questions and——

A. I do.

Q. ——giving those answers? [440]

A. I do.

Q. "Is the formula four per cent Ortho-K medium flowable, four pounds of lead arsenate, and two pounds of Mitox to each 100 gallons of water a mixture that is generally used in the San Joaquin Valley?

"No, it is not a mixture that is generally used

(Testimony of Dr. Alwyn C. Sessions.)

in the San Joaquin Valley. It is a mixture that may become generally used, but it is relatively new. We are very hopeful that it will be used rather generally."

A. That was because Mitox was in it.

The Court: Just a minute. Proceed, Mr. Hamilton.

Mr. Hamilton: At line 11, page 47, "In the spring of 1957, Dr. Sessions, was this particular mixture or formula one that was generally recommended for use on peach orchards?

"A. It was not generally recommended, no. It was never written in a spray program for that year, although it was reported as being efficient in other areas." A. May I ask the date?

The Court: The date of the deposition?

The Witness: Yes.

The Court: Well, it is right on it.

Mr. Hamilton: December 13, 1957.

The Witness: That was right at that date; it was not [441] generally used; Mitox was not too available.

The Court: I think, members of the jury, we will take our afternoon recess.

Mr. Hamilton: Your Honor, I believe I am through. I have one more reference to the deposition to look at and I believe it has been cleared.

The Court: All right.

Mr. Hamilton: I have no further questions, your Honor.



(Testimony of Dr. Alwyn C. Sessions.)

The Court: Members of the jury, we will take our afternoon recess, and keep in mind the admonition I have given you.

(Short recess.)

The Court: The jury is present?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: Yes, your Honor.

### Redirect Examination

Q. (By Mr. Barnard): Dr. Sessions, I have just one question: when in answer to questions propounded by Mr. Hamilton concerning the trees depicted in Defendant's Exhibit I-1 through I-7, you referred to using light oil. Were you referring to Ortho-K medium flowable oil?

A. I was referring always to Ortho-K medium flowable oil, when I used the term light oil.

Mr. Barnard: That is all. [442]

The Court: That is all, Dr. Sessions.

(Witness excused.)

Mr. Barnard: Now, if the Court please, subject to an offer of proof to which I have referred the Court previously, the defendant rests.

Mr. Hamilton: I have one witness in rebuttal, your Honor.

The Court: Very well.

Mr. Hamilton: We will call Tim Hanna.

JOHN LINDSAY TIMOTHY HANNA  
called as a witness by plaintiff in rebuttal, having  
been previously duly sworn, was examined and  
testified as follows:

Direct Examination

Q. (By Mr. Hamilton): Mr. Hanna, were you  
at the Grimm ranch with Mr. Fisher, the manager  
of the Bakersfield office of the Cal-Spray office  
late in April, 1957? A. Yes, I believe so.

Q. And did you participate in a conversation  
between Mr. Fisher and Mr. Grimm, in the Grimm  
orchard on that day?

A. I beg your pardon? I didn't—

The Court: Did you participate.

Q. (By Mr. Hamilton): Did you take part in  
a conversation? A. Yes, sir.

Q. Did you hear Mr. Fisher state to Mr. Grimm:  
do not [442] worry, the man from Richmond with  
the checkbook will be down and settle with you?

A. I remember hearing some such statement  
out there when I was with Mr. Grimm and Mr.  
Grimm's foreman and Mr. Fisher and me.

Q. Now, it doesn't necessarily mean that those  
exact words were used, but was that the content  
or import of Mr. Fisher's statement?

A. To some statement to that effect was made,  
yes.

Q. By Mr. Fisher?

A. If I remember correctly, yes.

Q. Did you, Mr. Hanna, in your capacity as an  
employee of Cal-Spray, write Mr. Fisher a mem-

(Testimony of John Lindsay Timothy Hanna.)  
Memorandum recommending disposition of Mr. Grimm's claim?

The Court: I think if I recall the testimony, you should have it "on a monetary disposition". Well, disregard my suggestion. Read the question, Miss Schulke.

(Question read.)

A. I put an interoffice memorandum on Mr. Fisher's desk to that effect.

Q. (By Mr. Hamilton): To what effect?

A. That I thought it ought to be—I would recommend that he would recommend it should be settled and taken care of and cleaned up. [443]

Mr. Hamilton: I have no further questions, your Honor.

#### Cross Examination

Q. (By Mr. Barnard): Mr. Hanna, you were in the sales department of Cal-Spray at that time, were you not?

A. That is correct.

Q. So is Mr. Fisher?

A. That is correct.

Q. And claims of this type are embarrassing to a sales department, are they not?

A. That is correct.

Q. And the sooner a claim of this type is cleared up, so you can sell goods without such a claim hanging over your head, the better you like it?

A. That is correct.

Mr. Barnard: I have no further questions.

Mr. Hamilton: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Hamilton: The plaintiff rests, other than I should like to move to amend our prayer for relief in our complaint to correspond with the proof that has been adduced in the trial.

The Court: I think you might prepare, Mr. Hamilton, such a document, and furnish a copy to Mr. Barnard, and I [444] will consider that Tuesday morning, at 9:00 o'clock.

You have no further evidence?

Mr. Hamilton: No.

The Court: You have no further evidence except the offer of proof?

Mr. Barnard: None, your Honor.

The Court: Members of the jury, both sides, so far as you are concerned, have completed their testimony in this case. The next step, of course, is the argument of counsel, and the next step is the instructions of the Court and then the case is given to you for your deliberation and decision.

(Admonition to jury, and jury excused until Tuesday, April 15, 1958, at 9:30 a.m.)

The Court: Let the record show the members of the jury have departed from the court room. Before lunch, Mr. Barnard made an offer of proof with respect to certain testimony adduced through the witness, Mr. Ogden. Counsel for the defendant objected to the receipt of the offer of proof. The Court stated that it would take the matter under advisement and rule later.

The Court has considered the offer of proof, and the Court will now reject that offered testimony.

Now, Mr. Barnard, I understand you have another offer of proof.

Mr. Barnard: Yes, if the Court please, through Dr. [445] Sessions I would like to produce testimony as to the condition of the Ogden orchard in 1957, the same one the Court has already ruled on. And that testimony, of course, would involve the pictures which were marked for identification, but not admitted.

I would like to produce through Dr. Sessions also testimony concerning the condition of the Elmer Woods orchard at Atwater, California.

The Court: I assume you are talking about Elmer Woods' peach orchard?

Mr. Barnard: Elmer Woods' peach orchard at Atwater, and introduce pictures concerning the condition of that orchard in 1957. And I would like to produce through Dr. Sessions testimony concerning the condition of the California Packing Corporation peach orchard in Merced, California, along with pictures and slides of the condition of that orchard in 1957, the spring of 1957.

Mr. Hamilton: To which I would object on the basis of relevancy and materiality, no similarity.

The Court: Well, the Court will make the same ruling with respect to the offered testimony to be introduced through Dr. Sessions that it has already made with respect to Mr. Ogden. The Court will reject the offer of proof.

Now, is there anything further, gentlemen?

Mr. Barnard: Nothing, your Honor. [446]

Mr. Hamilton: Unless at this time the Court

would desire to go into the question of the instructions.

The Court: Yes, because I will expect counsel to be prepared to argue the case starting at 9:30.

(Further discussion.)

(Adjournment at 4:00 p.m. April 11, 1958 to 9:30 a.m., on April 15, 1958.) [447]

Tuesday, April 15, 1958. 9:30 A.M.

(Stipulated jury present.)

(Opening argument by Mr. Hamilton.)

(Argument by Mr. Barnard.)

(Closing argument by Mr. Hamilton.)

The Court: Now, Mrs. Wailes and gentlemen, I guess it was last Tuesday you took the oath to well and truly try this case and base a true and just verdict on the law and the evidence. You have heard the testimony produced by the parties, and you have heard the argument of counsel, and it becomes now my duty to instruct you on the principles of law that apply to this case, and it is your duty as jurors to follow the law as I state it to you. On the other hand it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I state them to you.

If in these instructions, any rule, direction or idea be stated in varying terms, no emphasis thereon



is intended by me and none must be inferred by you. For that reason, you are *not single* out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all of the instructions and as a whole, and to [449] regard each in the light of all the others.

Although you, as jurors, are the sole judges of the facts, you are bound by your oath to follow the law as stated to you in these instructions and to apply the law so given to the facts as you find them to be from the evidence before you.

You are not to be concerned with the wisdom of any rule of law that I state to you. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any other view of the law, than that given in the instructions of the Court.

Now, as I have repeatedly told you throughout the trial of this case, the statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree to the existence of a fact, then the jury must accept the stipulation as evidence and regard that fact as stipulated to as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been stipulated to, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any

evidence ordered stricken by the Court, must be [450] entirely disregarded.

You are to consider only the evidence in the case, and the instructions, and the applicable presumptions. But in considering them you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your own experience as men and women.

At times during the trial I have been called upon to pass upon whether certain offered evidence might properly be received or not. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from my rulings. If I reject offered evidence, you must not speculate as to the reason counsel may have had in mind in offering it, you must not speculate as to what the answers to questions that were objected to might have been, and so evidence that has been rejected you must not consider it at all in any way. It is, of course, the duty of an attorney, when the other side offers testimony or other evidence which counsel feels to be not properly admissible, to object. In admitting evidence to which an objection is made, I, of course, do not in any way pass upon the weight of the evidence, and the fact that I may rule one way or the other does not indicate any view that I may have with respect to the weight or the effect of evidence. You are the sole judges of the [451] facts and the sole judges of the credibility of witnesses.

If during this trial I have said anything or done anything which has suggested to you that I am inclined to favor the claim of either party to this action, you will not suffer yourselves to be influenced by any such suggestion. If I have made any comments, or asked questions of witnesses, do not feel I have any views on the matter. Sometimes I ask questions or make statements solely in the belief it might be of assistance to the jury in receiving or considering the evidence. If I have made any comment as to the value or effect of evidence, and I don't recall that I have, you will not be influenced thereby. You are the sole judges, and if you feel I have made some statement, it is solely within your province to reject that statement or give it such weight as you may think it is entitled to.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

Now, the defendant in this action is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of the agent's authority, are, in contemplation of law, the acts and omissions respectively of the **corporation** whose agent he is.

The fact that the defendant is a corporation must in no [452] wise prejudice you in your deliberations or in your verdict. In a court of justice, such as this, jurors may not discriminate between corporations and natural individuals. Both natural

persons and corporations are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration as to justice by the same legal standards at your hands. You have no authority to tax the defendant corporation for the benefit of another person, solely because one of the parties happens to be a corporation, and you must deliberate and consider this case just as though there were two natural persons involved in this action.

Now, as I have stated before, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given by each witness, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner *in each* witness might be affected by the verdict; and the [453] extent to which, if at all, the testimony of each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to dis-

credit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy or inconsistency, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness as to any witness to be outweighed, by these considerations, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to [454] distrust such witness' testimony in other particulars; you may reject all of the testimony of that witness or give that testimony or such parts of it such weight as you feel it deserves.

Any evidence that has been received of an act, omission or declaration of a party or its agent which is unfavorable to his or its own interests, should be considered and weighed by you like any other admitted evidence, but evidence of the oral



admission of a party, or its agent, other than the testimony of a party or its agent in this trial, ought to be viewed by you with caution.

You are not bound to decide this case in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number, or a presumption of other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side or another. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on one side or the other. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. [455]

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the *contrary*, if from a consideration of the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you conclude that the balance of truth and probability point to the accuracy and honesty of that one witness.

Ordinarily the rules of evidence do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and



experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by the opinion of the expert witness. Give it the weight to which you feel it is entitled, whether that be great or slight, and you may reject it, if in your judgment, the reasons given for it are unsound.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect [456] evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. For instance, a presumption is that a person speaks the truth, that is the presumption. That presumption may be overcome, but unless overcome by other testimony, the jury is bound to follow the presumption and that continues in effect until it is outweighed by testimony to the contrary.

An inference is a deduction which the reason of the jury draws from the facts proved. It must

be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities of men, or the particular propensities of the person whose acts are under review by the jury.

In this case the parties have stipulated and agreed to the existence of the following facts which must be accepted by you as established facts in this case without further proof. These facts are:

1. That the defendant, through its authorized agents, inspected the peach orchard owned by plaintiff in January or February, 1957, and discovered certain destructive insects [457] therein and advised plaintiff of their findings, and that other destructive insects were likely to invade plaintiff's orchard.

2. That the defendant, through its authorized agents, recommended to plaintiff the use of 4% Ortho Light Medium Oil, 2 pounds of Ortho Mytox and 4 pounds of Ortho basic lead arsenate per 100 gallons of water, as a spray mixture to be used to control the insect pests present or likely to invade plaintiff's peach orchard, and recommended to plaintiff that said spray mixture be applied at the rate of 400 gallons per acre when his peach orchard was in the pre-pink-bud stage.

3. That the defendant sold and delivered to plaintiff a sufficient quantity of Ortho Light Medium Oil, Ortho Mytox and Ortho basic lead arsenate to cover his said peach orchard in accordance with the spray program recommended by the defendant for the purpose of plaintiff's using the same as an insect spray in his peach orchard.

4. That plaintiff used some, but not all, of the above mentioned agricultural chemicals as an insecticide and did spray the same upon his peach orchard.

As a result of the foregoing stipulation of facts, there remain only two issues of fact, the existence of which have not been stipulated or agreed upon by the parties.

These two issues are: [458]

First, was the application of the chemical spray to plaintiff's peach orchard the proximate cause of the injury, damage or illness of plaintiff's peach orchard?

Second, the extent, nature and amount of damages suffered and sustained by the plaintiff.

Now, if, under the evidence received in this case, and the principles of law given to you in these instructions, you are not satisfied by a preponderance of the evidence that the application of the chemical spray was the proximate cause of the injury, damage or illness of plaintiff's peach orchard, you must return a verdict in favor of the defendant.

If, however, under the evidence received in this case and the principles of law given to you in these instructions, you are satisfied by a preponderance of the evidence that the application of the chemical spray was the proximate cause of the injury, damage or illness of plaintiff's peach orchard, then and in such event, you must return a verdict in favor of the plaintiff and against the defendant for the amount of money that you find from a preponderance of the evidence the plaintiff has suffered and

sustained by reason of the application of the chemical spray to plaintiff's peach orchard.

Now, the proximate cause of an event is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the [459] result would not have occurred; it is the efficient cause, the one that necessarily sets the other causes in operation.

In order for the plaintiff to recover a verdict in his favor and against the defendant, the burden of proof rests upon the plaintiff to establish the existence of the two issues of fact stated in these instructions, by a preponderance of the evidence. "Burden of Proof" means that if no evidence were received on either side of such issues of fact, your findings as to them would have to be against the plaintiff and in favor of the defendant. When the evidence is contradictory, your decision must be made according to the preponderance of the evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issues preponderates, then your finding must be against the plaintiff.

The mere fact that an injury or disease to plaintiff's peach orchard occurred shortly following the application of a chemical spray supplied by defendant does not in and of itself raise a presumption that the injury or disease was caused by the chemi-

cal spray. The burden of proving such causation is upon the plaintiff, and unless that burden is [460] met by a preponderance of the evidence, your verdict must be for the defendant.

You are instructed that if from all the evidence in the case it is impossible for the jury to ascertain what was the cause of the injury to or disease suffered by the plaintiff's peach orchard without indulging in guess or conjecture, the jury must reach a verdict for the defendant.

Now, if you find from a preponderance of the evidence which has been presented to you, that the damage to the plaintiff's peach orchard was proximately caused by all or any part of the spray materials which he obtained from the defendant and applied to his orchard in accordance with the defendant's recommendations, then the plaintiff, Charles W. Grimm, is entitled to have and recover from the defendant, California Spray-Chemical Corporation, a sum sufficient to compensate him for all of his losses, directly and naturally resulting, in the ordinary course of events, from that damage. The plaintiff's losses in such event would include, if you find from a preponderance of the evidence that any or all of such losses occurred, the permanent reduction in the fair market value of his peach orchard, all of his extraordinary or unusual expenses in caring for his orchard, arising from the damage, including the reshaping and protection of his trees and the removal and disposal of dead plant material, and the net value to him of all such [461] peaches as the plaintiff would have produced in



the ordinary course of events, if the injury to his peach orchard had not occurred. But I caution you that each and all of the elements of damage which I have enumerated must be clearly ascertainable as to their nature and origin, and must not be based upon guess, conjecture or surmise.

If you should decide that the plaintiff is entitled to recover, although the amount of the verdict is left to your sound discretion, your award must be just and reasonable, and must be based upon the evidence introduced. This does not mean that any witness should have expressed an opinion as to the amount of pecuniary loss suffered by the plaintiffs. It means that your judgment must not be arbitrary or fanciful, but must have evidence behind it.

If you should find that the plaintiff is entitled to recover damages, then whether or not you may award him any sum for possible future detriment will depend on whether or not you find from the evidence that such detriment is reasonably certain to be suffered as a proximate result of the spraying of the plaintiff's trees. If it is, then plaintiff should be compensated for it. If it is not, then no award should be made for future detriment.

The amount of damages prayed for is \$22,537.86, but this allegation is merely a claim, and is not evidence, and must not be considered by you as evidence in the event you [462] should undertake to determine the amount of plaintiff's damage.

I have instructed you on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become



pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages or not, and the fact that they have been given to you must not be considered by you as intimating any view of my own on the issue of liability, or as to which party is entitled to your verdict.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that all jurors agree. Your verdict must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching a verdict, if you can do so without violence to your individual judgment. Each of you must decide the case for himself or herself, but you should do so only after an impartial consideration of all of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to change your mind if convinced that your opinion is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or solely for the mere purpose of returning a verdict.

Remember you are not partisans in this matter. You are [463] judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Now, upon retiring to consider your verdict you will select one of your number to act as foreman or forewoman. The person selected will preside over your deliberations and be your spokesman in court.

I have prepared forms of verdict, which I will hand to you.

One verdict is in the form, with the title of this Court, United States District Court, Southern District of California, Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, defendant, No. 1798-ND Civil. Verdict.

"We, the jury impaneled to try the above entitled cause, find in favor of the plaintiff, Charles W. Grimm, and against the defendant, California Spray-Chemical Corporation, a corporation, and fix plaintiff's damages in the sum of \$....." Date and line for the foreman.

The other form of verdict carries, of course, the same title and cause, and says:

"We, the jury impaneled to try the above entitled cause, find in favor of the defendant, California Spray-Chemical Corporation, a corporation, and against the plaintiff, Charles W. Grimm." Also dated April blank, 1958 and the place for the signature of your foreman or forewoman.

So accordingly as you find and determine in the matter, under the law and the evidence, you will select the form of [464] verdict upon which you unanimously agree, and you will take these two forms of verdict to the jury room with you. When you have reached a unanimous agreement as to your verdict, you will have your foreman or forewoman fill in the date, fill in the blank spaces on the verdict, and then return to the court room with your verdict.

Now, if it becomes necessary during your deliber-

ations to communicate with the Court, you may notify Mr. Scott, the bailiff, but remember that you must not reveal to the Court or the bailiff or to any other person how the jury stands, until you have reached a unanimous verdict.

The Court will inquire of counsel whether there are objections to any of the instructions?

Mr. Barnard: None, your Honor.

Mr. Hamilton: No objection, your Honor.

The Court: We will swear the bailiff.

(H. R. Scott was duly sworn as bailiff)

The Court: Now, I think probably it would be more convenient to permit the jury to deliberate here in the courtroom and you can use not only the court room here but the jury room upstairs. When we leave, counsel must remove with them all of their briefcases and all materials that have not been received in evidence. The Clerk of the court will leave available to you on the table all exhibits which have been received in evidence, including the one on the [465] board over there.

Mrs. Wailes and gentlemen, all of the exhibits which have been received in evidence are the ones on the counsel table and the one on the board.

Everyone else will withdraw from the court room now, and the jury may commence their deliberations.

(Thereupon, at 2:30 p.m., the jury commenced their deliberations)

(The jury returned at 5:26 p.m.)

The Court: Do counsel stipulate the presence of the jury?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Ladies and gentlemen, we have arranged for dinner for the members of the jury over at the Elks Club; they have a private dining room and it is the most convenient place for that purpose. So I am going to send you to dinner now, and in view of the fact Mrs. Wailes is on the jury I am going to have a matron sworn in as additional bailiff, so would you please come forward and be sworn, Mrs. Laird.

(Mrs. Laird was sworn as matron)

The Court: Then the members of the jury will be taken to dinner, in charge of the bailiff Mr. Scott and the matron, and following dinner you will return here and further deliberate. [466]

(After dinner, the jury returned at 7:05 p.m.)

(Stipulated jury present.)

The Court: Mrs. Wailes and gentlemen, have you arrived at a verdict? Who is the foreman? Mr. Peden. Has the jury arrived at a verdict?

Foreman Peden: No, we have not. We have asked for additional information.

The Court: What information?

Foreman Peden: We would like to have the testimony of Dr. Wilson, Mr. Hanna and Mr. Browne read.

The Reporter: I didn't know they wanted the testimony of Mr. Browne. It will take a little time to look that up.

The Court: We might read the testimony of the other two. Miss Schulke, if you will, make an effort so all members of the jury might hear you.

(The testimony of Dr. E. E. Wilson and J. L. Timothy Hanna was read by the reporter.)

The Court: I am going to ask the jury, in view of the testimony read by Miss Schulke, when Mr. Hanna was recalled to the stand, that related to Mr. Fisher, does the jury care to have Mr. Fisher's testimony read, or not?

Foreman Peden: Your Honor, I don't think it will be necessary.

The Court: It may take a while for the reporter to locate the other testimony in her notes. I think, except for the jury, we will all withdraw temporarily from the [467] court room and Miss Schulke will check her books, and just as soon as she has found Mr. Browne's testimony we will come back in here.

(The jury thereupon resumed deliberations, and returned to court at 9:05 p.m.)

(Stipulated the jury was present.)

The Court: Mr. Peden, has the jury arrived at a verdict?

Foreman Peden: We have not. I am sorry to have held the court reporter up. There was a slight misunderstanding.

(The testimony of Ashley Browne was read by the court reporter.)

The Court: Mr. Peden, is there any other testimony the jury wishes to have read back?

Foreman Peden: I think that is all.

The Court: Everybody except the jury will now leave and the jury will resume their deliberations.



(The jury resumed their deliberations, and returned into court at 10:00 p.m.)

(Stipulated jury was present.)

The Court: Mrs. Wailes and gentlemen of the jury, you have had a long day, some of you drive some distance. There are two courses open to us: I can let you separate and go home, and you can resume your deliberations, say, returning at 9:30 or 10:00 tomorrow morning; or if you desire you can continue your deliberations tonight. I would like to [468] find out which you prefer. If you care to discuss that matter privately, we will all withdraw from the court room and you can let the bailiff know what you prefer to do. As I say, I will permit you to separate and go home, to return tomorrow for further deliberation, if that is your desire, or you may desire to continue your deliberations tonight. Do you prefer to discuss that privately among yourselves?

Foreman Peden: I think we should discuss it among ourselves.

The Court: We will all withdraw, and you notify Mr. Scott.

(The jury resumed deliberations, and returned to court at 10:07 p.m.)

(Stipulated jury was present.)

The Court: Mr. Peden?

Foreman Peden: Your Honor, I think we would like to return in the morning and resume deliberations.



The Court: Very well. Well, the Court is going to permit you to do that. I might state it is not a common practice to permit a jury to separate after they have started deliberations, but I feel it is proper in this case. I do want to caution you that you must not talk about the case when you get home to any members of your family. I want you to bear that in mind, do not talk about the testimony or the facts, or your opinion, with your husband or your wife. [469] I realize you have to tell them where you have been and you have to tell them in the morning where you are going. But I do want to admonish you not to talk about the case to your friends or family, and of course do not permit them to ask you questions about the case, or the evidence, or what the facts are, or how the other members of the jury feel about it.

This is an extremely important admonition I am giving you, and one I know you will scrupulously observe. And of course do not express any opinions as to how you feel about the case to anyone.

Do counsel have any objections to the Court permitting the jurors to separate and return home?

Mr. Barnard: No, your Honor, no objection.

Mr. Hamilton: No objection, your Honor.

The Court: The jury then will be excused to separate and go to their homes, and I think I will ask you to return tomorrow morning at 10:00. I have a jury coming in at 9:30, and I don't think that matter is going to last very long. So I will now excuse the jury until tomorrow morning at 10:00 o'clock, and the Court will now adjourn.

(Thereupon, at 10:09 p.m., an adjournment was taken until 10:00 a.m., April 16, 1958.)

Wednesday, April 16, 1958, 10:00 a.m.

(The jury resumed deliberations, and returned into court at 11:51 a.m.)

(Stipulated jury was present.)

The Court: We have arranged for lunch for you at the Elks Club in the private dining room, so you will accompany the bailiff and matron, and return after lunch and resume your deliberations. Bear in mind the general admonition; do not talk about the case while over there or permit any other person to talk to you about the case.

(Thereupon, the jury went for lunch, and returned to resume deliberations; and returned to court at 3:13 p.m.)

(Stipulated the jury was present.)

The Court: Mr. Peden, has the jury arrived at a verdict?

Foreman Peden: Your Honor, the jury is unable to reach a verdict at the present time. We do not seem able to agree. It seems very improbable we will agree.

The Court: Well, the verdict reached by a jury of course should be the verdict of each juror and all members of the jury of course should individually arrive at a common verdict, if it can be done without doing violence to your individual judgment. I want the jurors, of course, to have ample opportunity to explore the evidence and ample opportunity for full and complete discussion, and if the

jurors can [471] reasonably do so, as I indicated without violence to your independent judgment, reach a verdict, why, of course, it serves, in my opinion, the administration of justice.

When a jury is unable to arrive at a verdict it means, of course, that the case has to be retried, and it means that some other jury would possibly have the same problems that this jury has.

So I would say to you that if you feel that some further deliberation might be fruitful, then I would suggest that you endeavor, if you reasonably can, to reach a verdict.

On the other hand, of course, you have deliberated since yesterday afternoon and if it is the view of the jurors that further discussion would not be fruitful, then of course there is not much point in requiring that you continue to deliberate.

Now, I don't want by any word or action of mine to convey the idea that I am trying to force, or use any pressure on any members of the jury, for the purpose of reaching a verdict. But if you can, as I say, reasonably do so under the law and the evidence, then I think the interests of all concerned would be served by you being able to agree.

Now, Mr. Peden, as foreman of the jury, has expressed his opinion that it appears unlikely to him—if I misquote you, Mr. Peden, let me know—it appears unlikely the members will be able to arrive at a unanimous verdict, and of course the verdict must be unanimous. [472]

I don't want any juror to indicate to me how he stands, numerically or any other way, but does any

other juror care to express a view, either in support of Mr. Peden's opinion, or to the contrary, or somewhere in between?

How do you feel, Mr. Tielman?

Mr. Tielman: Your Honor, we have deliberated pro and con for quite a number of hours, and it has got to the point where we apparently cannot agree on a verdict.

The Court: I see. You feel you have reached a deadlock. Mr. Porteous, how do you feel?

Mr. Porteous: Your Honor, I feel the same way.

The Court: Does any other juror have any contrary view?

Well, I am going to suggest this: suppose that you deliberate another half hour, we will say, and if you are still of the same view that you are deadlocked and hopelessly divided, then I think probably I will discharge you.

Juror No. 6: Your Honor, might I say a word. We are right where we were last night.

The Court: In other words, you haven't made much progress.

Juror No. 6: We haven't made any progress today, not since I left last night at ten o'clock.

The Court: Mr. Hallowell, you have heard the statements of the jurors. Do you have any view to suggest to the Court?

Mr. Hallowell: I would only say this, your Honor, of [473] course both sides want a verdict but no pressure or compulsion. Perhaps what the Court has said, if the jurors had time amongst themselves to talk it over, within 15 minutes they

may have determined that this—we should know whether we should go on further. Your Honor suggested half an hour. I think perhaps with what has been said they should have an opportunity to at least discuss it among themselves.

The Court: How do you feel, Mr. Brown?

Mr. Brown: I think perhaps Mr. Hallowell's suggestion is a good one. After the jury has had a discussion, they should reach a decision in less than half an hour.

The Court: Suppose you deliberate another 15 minutes, or so. As I say, I don't want you to feel in any way any pressure or influence of any kind being exerted by me on any member of the jury. As stated before, a verdict must be unanimous but it must represent the considered conscience of each juror.

All right, we will take a recess.

(The jury resumed deliberations, and returned to court at 4:04 p.m.)

(Stipulated jury was present.)

The Court: Mr. Peden, have you arrived at a verdict?

Foreman Peden: We have, your Honor.

The Court: Is the verdict the verdict of each member of the jury? [474]

Foreman Peden: Yes.

The Court: It is unanimous?

Foreman Peden: Yes.

The Court: Has the form of verdict been completed in accordance with my direction?

Foreman Peden: Yes.

The Court: It has been completed and dated and signed by you as foreman?

Foreman Peden: Yes.

The Court: I will ask the Clerk to read and record the verdict.

The Clerk: Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, a corporation, defendant. Verdict: "We, the jury impaneled to try the above entitled cause, find in favor of the plaintiff, Charles W. Grimm, and against the defendant, California Spray-Chemical Corporation, a corporation, and fix plaintiff's damages in the sum of \$4,750. April 16, 1958, J. S. Peden, Foreman."

Is that your verdict, members of the jury?

Jurors: Yes. Yes.

The Court: Let's poll the jury.

(The Clerk thereupon polled the jury, each juror answering in the affirmative to the question "the verdict, as presented and read, was that your verdict?")

The Court: I am going to discharge the jury at this time. [475] The Court in discharging the members of the jury wishes to express its appreciation of the willingness of the members of the jury to perform this very important service that is necessary in the administration of justice.

(Jury retires at 4:07.)

The Court: Let the record show the members of the jury have departed from the courtroom. The Court will direct counsel for the plaintiff to prepare



a judgment based upon the verdict, and to submit of course to counsel for defendant for his approval as to form, or non-approval as to form.

Are there any other matters either counsel care to bring before the Court?

Mr. Barnard: If the Court please, would the Court be willing to make an order of ten-day stay of execution after the judgment?

The Court: Yes, the Court will provide the execution be stayed for a period of ten days after entry of judgment.

Have you any motions, Mr. Hamilton?

Mr. Hamilton: Not at this present time, your Honor.

The Court: Well, the Court wishes to express its appreciation to counsel for their cooperation during the trial of this action. If there is nothing further, the Court will adjourn, to reconvene tomorrow morning on other matters. [476]

[Endorsed]: Filed July 9, 1958.

[Endorsed]: No. 16091. United States Court of Appeals for the Ninth Circuit. Charles W. Grimm, Appellant, vs. California Spray-Chemical Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: July 12, 1958.

Docketed: July 16, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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United States Court of Appeals  
For the Ninth Circuit

No. 16091

CHARLES W. GRIMM, Appellant,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-  
TION, a corporation, Appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY, AND  
DESIGNATION OF RECORD DEEMED  
MATERIAL THERETO BY APPELLANT

Designation of Points on Appeal

The points on which Appellant, Charles W. Grimm, intends to rely in the above-entitled Court

on this appeal from the trial court's denial of his motion for a new trial, limited solely and exclusively to the issue of the nature and amount of damages, are as follows:

1. That the trial court acted in excess of its jurisdiction by issuing an order vacating the verdict of the jury in its entirety and granting a new trial on all issues that had been submitted to the jury (proximate cause and damages), more than ten days after entry of judgment, more than ten days after the date on which motions for a new trial could be filed, and at a time when the only motions before it were defendant's (appellee here) for a new trial on all issues, which the trial court expressly denied, and plaintiff's (appellant here) for a new trial limited exclusively to the issue of the nature and amount of damages.

2. That the trial court abused its discretion by issuing an order vacating the verdict of the jury in its entirety and granting a new trial on the issues of proximate cause and damages, the two issues submitted to the jury, more than ten days after entry of judgment and after the time for filing motions for a new trial had passed, when neither party had moved the court for a new trial limited to those two issues.

3. That the trial court abused its discretion by issuing its order vacating the verdict of the jury in its entirety and granting a new trial on the issues of proximate cause and the nature and extent of damages, more than ten days after entry of the

judgment, under circumstances where the trial court had denied defendant's (appellee here) motion for a new trial on all issues, where the jury's verdict in favor of plaintiff (appellant here) on proximate cause was fully supported by the evidence, where the amount of damages awarded was grossly inadequate and less than the undisputed amount, and where plaintiff had moved the trial court for a new trial, limited solely to the issue of nature and extent of damages.

Designation of Record to be Printed  
By Appellant

Title of Document	Record page Clerk's transcript
Judgment .....	2
Clerk's Notice of Entry of Judgment.....	4
Plaintiff's notice of intention to move for new trial on Issue of Damages, together with Points and Authorities in support of Motion for New Trial and Specification of Particulars in reference to the Evidence.....	5
Motion for New Trial by Defendant.....	23
Affidavit of Alwyn C. Sessions in support of Defendant's Motion for New Trial.....	25
Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial on Issue of Damages alone .....	30
Affidavit of James S. Peden, Jury Foreman....	36

Affidavits in Opposition to Affidavit of Alwyn C. Sessions .....	38
Trial Court's Memorandum and Order on Mo- tions for New Trial, etc.....	45
Notice of Intention to Appeal and of Appeal...	49
Designation of Record on Appeal and Statement of Points .....	54

Dated: July 21, 1958.

CONRON, HEARD & JAMES and  
WAYNE M. HAMILTON,  
/s/ By WAYNE M. HAMILTON  
Attorneys for Appellant  
Charles W. Grimm.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 22, 1958. Paul P.  
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF  
RECORD DEEMED MATERIAL BY AP-  
PELLEE

In addition to the portions of the record heretofore designated to be printed by the appellant, appellee further requests that the five (5) volumes of reporter's official transcript of proceedings designated as Item B on the certificate by John A. Childress, Clerk of the United States District Court, dated July 14, 1958, be printed as a part of the record on the above entitled appeal.

Dated: July 28, 1958.

WILD, CHRISTENSEN,  
BARNARD & WILD,  
/s/ ROBERT M. BARNARD,  
Attorneys for Appellee, California Spray-Chemical  
Corporation, a corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 29, 1958. Paul P.  
O'Brien, Clerk.